

(15)
No. 93-141-CSX
Status: GRANTED

Title: West Lynn Creamery, Inc., et al., Petitioners
v.
Jonathan Healy, Commissioner of Massachusetts
Department of Food and Agriculture

Docketed:
July 14, 1993

Court: Supreme Judicial Court
of Massachusetts

Counsel for petitioner: Altman, Michael L., Rosenbaum, Steven
J.

Counsel for respondent: Smith, Eric A.

40 printed copies rec'd 071493-1 retained 40
reprinted copies rec'd 072693

Entry	Date	Note	Proceedings and Orders
1	Jul 14 1993	G	Petition for writ of certiorari filed.
3	Aug 4 1993		Order extending time to file response to petition until August 27, 1993.
4	Aug 26 1993		Brief amici curiae of Massachusetts Association of Dairy Farmers, et al. filed.
5	Aug 27 1993		Brief of respondent Jonathan Healy, Commissioner in opposition filed.
6	Sep 1 1993		DISTRIBUTED. September 27, 1993
7	Sep 23 1993	X	Reply brief of petitioners West Lynn Creamery, et al. filed.
8	Sep 24 1993		Letter from counsel for the petitioner containing a First Circuit Order received and distributed, Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.
10	Nov 9 1993	*	***** Record filed. Certified record proceedings Supreme Judicial Court of Massachusetts.
11	Nov 15 1993		Joint appendix filed.
12	Nov 15 1993		Brief of petitioners West Lynn Creamery, et al. filed.
13	Nov 15 1993		LODGING consisting of 40 copies of U.S. District Court opinion - Marigold Foods, et al. v. Redalin, No. 4-92-1084 received from counsel for the petitioner.
16	Nov 15 1993		Brief amicus curiae of Cumberland Farms, Inc. filed.
14	Nov 16 1993		Brief amicus curiae of Vermont filed.
15	Nov 16 1993		Brief amici curiae of Milk Industry Foundation, et al. filed.
18	Dec 13 1993		Brief of respondent Jonathan Healy, Commissioner filed.
17	Dec 14 1993		Brief amici curiae of Massachusetts Association of Dairy Farmers, et al. filed.
19	Dec 14 1993		Brief amicus curiae of New Jersey filed.

No. 93-141-CSX

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

20	Dec 29 1993		SET FOR ARGUMENT WEDNESDAY, MARCH 2, 1994 (2ND CASE).
21	Dec 31 1993		Reply brief of petitioners filed.
22	Jan 4 1994		CIRCULATED.
23	Mar 2 1994		ARGUED.

93-141
No.

Supreme Court, U.S.

FILED

JUL 14 1993

OFFICE OF THE CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

GREGORY WATSON, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. ALTMAN
Counsel of Record
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Does a state law requiring milk wholesalers to pay an "assessment" on all milk sold within the state, including milk produced out-of-state, and which provides that all assessments collected are then to be paid over to in-state producers only, despite the fact that most milk sold within the state is produced outside the state, violate the Commerce Clause of the United States Constitution within the meaning of this Court's decision in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)?

II. Does the burden imposed on interstate commerce by a state law which requires milk wholesalers to pay an "assessment" on all milk sold within the state, including milk produced out-of-state, and which provides that all assessments collected are then to be paid over to in-state producers only, outweigh the law's benefit of protecting local dairy farmers, within the meaning of this Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)?

LIST OF PARTIES.

The Petitioners are West Lynn Creamery, Inc. and LeComte's Dairy, Inc.¹ The respondent is Gregory Watson, the Commissioner of the Massachusetts Department of Food and Agriculture.

¹ Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

Table of Contents.

Questions presented for review	i
List of parties	ii
Table of contents	iii
Table of authorities	vi
Petition	1
Opinions below	2
Jurisdiction	2
Constitutional provisions and regulations involved	3
Statement of the case	3
I. Petitioners' businesses	4
II. Federal regulation of the milk industry	4
III. The pricing order	6
IV. The proceedings below	8
Reasons for granting the writ	9
I. The opinion below raises important issues of national significance which are unlikely to be satisfactorily resolved by the courts	9
II. The decision below clearly conflicts with the decisions of federal courts regarding whether states may implement pricing orders to protect their local dairy farmers	13
III. The decision below conflicts with prior decisions of this Court and, if left undisturbed, will undermine essential constitutional restraints on state regulation of interstate commerce in the dairy industry	16
Conclusion	21

Table of Authorities Cited.

CASES.

<i>Baldwin v. G.A.F. Seelig</i> , 294 U.S. 511 (1935)	
	i, 10, 11, 12, 13, 15 <i>et seq.</i>
<i>Block v. Community Nutrition Institute</i> , 467 U.S. 340 (1984)	5
<i>Dean Milk Co. v. Madison</i> , 340 U.S. 349 (1951)	10, 12
<i>Farmland Dairies v. McGuire</i> , 789 F. Supp. 1243 (S.D. N.Y. 1992)	13, 14, 15, 16n
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	14n
<i>Hood & Sons v. Du Mond</i> , 336 U.S. 525 (1949)	10, 12
<i>Marigold Foods v. Redalin</i> , 809 F. Supp. 714 (D. Minn. 1992)	13
<i>Milk Board v. Eisenberg Co.</i> , 306 U.S. 346 (1939)	10
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	10, 16, 20
<i>Nebbia v. New York</i> , 291 U.S. 502, 517-518 (1934)	5, 10, 11n, 12
<i>Opinion of the Justices</i> , 601 A.2d 610 (Me. 1991)	13n
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617, 624 (1978)	17
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137, 142 (1970)	i, 9, 16, 20
<i>Polar Ice Cream & Creamery Co. v. Andrews</i> , 375 U.S. 361 (1964)	10, 12
<i>West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture</i> , 415 Mass. 8, 611 N.E.2d 239 (1993)	8, 13, 15n, 16n, 18 <i>et seq.</i>
<i>Wyoming v. Oklahoma</i> , 112 S.Ct. 789, 800 (1992)	17

TABLE OF AUTHORITIES CITED.

STATUTES.

Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 <i>et seq.</i>	4, 5
28 U.S.C. § 1257(a)	3
42 U.S.C. § 1983	8

REGULATIONS.

The Amended Pricing Order, dated February 26, 1992	3
New England Federal Milk Marketing Order No. 1	5

UNITED STATES CONSTITUTION.

Article 1, Section 8	3
----------------------	---

MISCELLANEOUS.

<i>The Federal Milk Marketing Order Program</i> , Marketing Bulletin No. 27 (1989)	5
------------------------------------------------------------------------------------	---

No.

**In the
Supreme Court of the United States**

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

GREGORY WATSON, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

The Petitioners, West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's"), respectfully pray that a writ of certiorari issue to review the Opinion of the Massachusetts Supreme Judicial Court entered in the above entitled case on April 15, 1993.

OPINIONS BELOW

The Opinion of the Massachusetts Supreme Judicial Court is reported at 415 Mass. 8, 611 N.E.2d 239 (1993) and is reprinted in Appendix A to this Petition at A-1.² The Order of the Massachusetts Supreme Judicial Court staying the issuance of its rescript pending this Court's determination of the constitutionality of a pricing order is unreported and is reprinted in Appendix B to this Petition at A-15. The Order of the Massachusetts Appeals Court enjoining the Commissioner from revoking the Petitioners' milk dealers' licenses is unreported and is reprinted at A-17. The opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at A-22. The Amendment to the Opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at A-25. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking West Lynn's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at A-27. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking LeComte's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at A-34.

JURISDICTION

The Opinion of the Massachusetts Supreme Judicial Court, the highest state court in Massachusetts, was entered on April 15, 1993. The Massachusetts Supreme Judicial Court held that a milk pricing order, issued by the Commissioner of the Massa-

² Citations to material printed in the Appendices appear as "A-____."

chusetts Department of Food and Agriculture, did not violate the Commerce Clause of the United States Constitution. No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Article 1, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have the Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

The Amended Pricing Order issued by the Commissioner of the Massachusetts Department of Food and Agriculture is reprinted at Appendix C to this Petition at A-41.

STATEMENT OF THE CASE

Tension between various states regarding the pricing and marketing of milk in the United States has surfaced periodically since at least the 1930's. The issue presented by this case arises because another state, this time Massachusetts, seeks to protect its dairy farmers from competition in the interstate market for milk, at the expense of out-of-state dairy farmers, local consumers, and wholesalers. The mechanism of economic protectionism is an assessment imposed at the wholesale level on all milk sold within the state, including milk produced out-of-state. That assessment is then deposited into a separate

fund and rebated to in-state dairy farmers only, despite the fact that most of the state's milk is produced by out-of-state dairy farmers. The precise question here is whether a state pricing order upheld by the Massachusetts Supreme Judicial Court, despite a finding that the pricing order burdens interstate commerce, violates the Commerce Clause of the United States Constitution.

I. THE PETITIONERS' BUSINESSES

The Petitioners, West Lynn and LeComte's, are Massachusetts licensed milk dealers who sell milk and related dairy products on the wholesale level in New England. Approximately ninety-seven percent of West Lynn's and LeComte's milk is purchased from dairy farmers in New York and Maine; less than three percent of their milk is purchased from Massachusetts dairy farmers. West Lynn and LeComte's purchase their milk from out-of-state dairy farmers who compete with Massachusetts dairy farmers. West Lynn and LeComte's compete with other milk wholesalers, some of whom purchase a substantially larger percentage of their milk from Massachusetts dairy farmers.

II. FEDERAL REGULATION OF THE MILK INDUSTRY

Milk that is produced by dairy farmers in one state is often sold to wholesalers in another. To reduce the risk that interstate rivalries may jeopardize the flow of a fresh supply of milk, marketing dairy products throughout the United States has been subject to federal regulation. In 1937, in response to intense competition between dairy farmers in various states, the Agricultural Marketing Agreement Act (the "Act") 7 U.S.C. §§ 601 *et seq.*, was passed. The Act authorizes the Secretary of

Agriculture (the "Secretary") to issue milk marketing orders setting minimum prices that processors, such as the Petitioners, must pay to dairy farmers for their milk. *Block v. Community Nutrition Institute*, 467 U.S. 340, 341 (1984) citing 7 U.S.C. §§ 601 *et seq.* The essential purpose of the Act is to raise producer prices to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers in each state in each region of the country. *Block v. Community Nutrition Institute*, 467 U.S. at 340 citing S. Rep. No. 1011, 74th Cong. 1st Sess. 3 (1935); *see also, Nebbia v. New York*, 291 U.S. 502, 517-518 (1934).

Each of the marketing areas covered by the federal marketing orders encompasses several states. Each area is designed to include milk distributors who compete with each other in the sale of milk. *See The Federal Milk Marketing Order Program*, Marketing Bulletin No. 27 at 19 (1989). For many years, the Secretary has issued and enforced one milk marketing order for virtually all of New England — New England Federal Milk Marketing Order No. 1 ("Order No. 1"). The Order No. 1 marketing area includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire.

The Act's minimum price regulation across state lines reflects the interstate nature of commerce in the milk industry. Throughout the United States, milk is regularly exported from the less populated states into the more densely populated states. Of the six New England states, only the two most sparsely populated — Vermont and Maine — are "export states." Dairy farmers within those two states produce far more milk than is consumed there. The excess milk is exported across state lines and sold to milk wholesalers, such as the Petitioners, who package milk for consumers in the more densely populated New England states. Massachusetts is an import state: it only produces about thirty-five percent of all of the milk products, and ten percent of the fluid milk, sold in the state.

In setting minimum prices, the market administrators from each region must consider economic conditions in *all* states within the region. No provision in a marketing order may favor dairy farmers in one state over dairy farmers in other states. See 7 U.S.C. § 608c(18).

Nothing in the Act expressly precludes a state from supporting its dairy farmers. Nor does the Act preclude a state from setting minimum prices above the federal minimum price. The problem in this case is that Massachusetts has structured its law so as to discriminate against out-of-state dairy farmers and those who purchase milk from them. This discriminatory scheme creates a problem for the nation, not only because of the Commerce Clause, but also because the Congress has recognized that the marketing of milk, unlike the marketing of other products, is a matter of national concern.

III. THE PRICING ORDER

On January 28, 1992, the Commissioner of the Massachusetts Department of Food and Agriculture declared the existence of a state of emergency. (A-56, 57). The essence of the declaration was that Massachusetts dairy farmers are going out of business because they cannot compete successfully with dairy farmers in other New England states. (A-53). On the basis of that declaration, the Commissioner issued a pricing order (the "Pricing Order"). (A-41).

The Pricing Order does more than establish a minimum price to be paid by milk wholesalers to Massachusetts producers above the federally established minimum milk price.³ If the

³The price differential between the Order No. 1 minimum price and the Massachusetts minimum price will be referred to as the "Premium." The Premium to be paid by each processor is based on the difference between \$15/cwt and the Order No. 1 blend price for milk multiplied by the amount of Class I milk the dealer sold in Massachusetts during the previous month, divided by three. (A-44, 45).

Commissioner had raised the price of Massachusetts produced milk and taken no other protectionist action, the Massachusetts dairy farmers would have been left to the mercy of out-of-state competitors who could sell milk below the Massachusetts price. Milk wholesalers would naturally be inclined to buy lower priced raw milk from farmers in neighboring states. The Commissioner, therefore, had to design a pricing scheme that would permit his local dairy farmers to benefit from a higher price without suffering the market consequences of charging a higher price.

The Pricing Order's structure, therefore, is made elaborate and cumbersome for one purpose — to protect local dairy farmers from interstate competition. First, the Premium is not paid by the milk wholesalers directly to the Massachusetts farmers. Instead, the Pricing Order requires milk wholesalers, whether located in or out of the Commonwealth, to pay a monthly "assessment" to the Commissioner based on the amount of Class I milk sold for consumption in Massachusetts, even if the milk wholesaler purchased its raw milk from out-of-state dairy farmers. (A-45). Second, the assessments collected by the Commissioner are not deposited into the General Fund of the Commonwealth of Massachusetts. Instead, the Commissioner deposits the assessments into a separate fund, the Massachusetts Dairy Equalization Fund (the "Fund"). (A-47). Finally, the amounts paid into the Fund are distributed to Massachusetts dairy farmers based on each farmer's pro-rata share of the Massachusetts market. (A-44, 46). Significantly, no monies are distributed to out-of-state dairy farmers, despite the fact that most of the money paid into the Fund is derived from the sale of out-of-state milk. During the months of May through September, 1992, the Massachusetts dairy farmers received approximately \$3 million from the Fund. This war chest was used to bolster the economic position of Massachusetts dairy farmers, which in turn would dull the competitive edge of the more efficient dairy farmers in other states.

IV. THE PROCEEDINGS BELOW

On July 23, 1992, the Petitioners filed this civil rights action pursuant to 42 U.S.C. § 1983 in the Massachusetts Superior Court. *West Lynn Creamery, Inc. et al. v. Commissioner of the Department of Food and Agriculture*, C.A. 92-4610-G.⁴ The Petitioners contended that the Pricing Order violates the Commerce Clause of the United States Constitution because it discriminates against interstate commerce. The Petitioners argued that the Pricing Order is a *per se* violation of the Commerce Clause because it is both discriminatory in purpose and discriminatory in practical effect. The Petitioners sought declaratory and injunctive relief in the Massachusetts Trial Court. Preliminary relief was denied. (A-21). The Petitioners appealed to the Massachusetts Appeals Court which granted relief in a temporary order. (A-17). On December 21, 1992, the case was transferred, *sua sponte*, to the Massachusetts Supreme Judicial Court.

In reviewing the Pricing Order, the Massachusetts Supreme Judicial Court recognized that the Pricing Order was designed to "aid" the Massachusetts dairy farmers. *See West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10). The court also recognized that the Pricing Order burdens interstate commerce. *Id.* at 17, 611 N.E.2d. at 244 (A-11). The court, however, rejected the Petitioners' Commerce Clause challenge holding that while the Pricing Order burdens interstate commerce, the in-state benefits from the Pricing Order outweigh its "incidental" burdens. *Id.* at 19, 611 N.E.2d at 245 (A-11).

⁴On November 18, 1992, the Petitioners also filed separate actions in the Massachusetts Superior Court seeking review of the Commissioner's Decisions revoking their milk dealers' licenses. *West Lynn Creamery, Inc. v. Watson*, Civil Action No. 92-6914G; *LeComte's Dairy, Inc. v. Watson*, Civil Action No. 92-6924G. On December 11, 1992, a Superior Court judge reserved and reported these cases to the Massachusetts Appeals Court. On December 15, 1992, the Massachusetts Appeals Court consolidated the cases with Petitioners' civil rights action.

Relying on *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the court concluded that the Pricing Order does not violate the Commerce Clause because the burden imposed on interstate commerce is not clearly excessive in relation to the putative local benefits. *Id.*, 611 N.E.2d. at 245 (A-13).

Subsequently, on June 9, 1993, the Massachusetts court entered an Order staying the issuance of its rescript pending this Court's determination of the constitutionality of the Pricing Order. (A-15).

REASONS FOR GRANTING THE WRIT

The decision of the Massachusetts Supreme Judicial Court warrants review by this Court for three compelling reasons. First, the issue raised by this case — whether a state may create protectionist laws in the dairy industry which adversely affect interstate commerce — is a recurring issue of national significance that merits consideration by this Court in its own right. Second, whether state pricing orders are constitutional has given rise to a clear conflict among the state and federal courts that only this Court can resolve. Finally, the Massachusetts court's resolution of this issue is in clear conflict with prior decisions of this Court, and if left undisturbed, would undermine the constitutional restraints delineated by this Court regarding a state's power to regulate interstate commerce in the dairy industry.

I. THE OPINION BELOW RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE WHICH ARE UNLIKELY TO BE SATISFACTORILY RESOLVED BY THE COURTS.

Over the years, there has been persistent conflict between the states regarding the regulation of milk prices in the United

States. As the milk industry is highly competitive, states have sought to find ways in which to help their local farmers and prevent out-of-state competitors from gaining an advantage when lower costs and more efficient production threaten their in-state businesses. This Court has been consistently asked to resolve these conflicts, and to provide guidance to the states as to the constitutional parameters of their ability to exercise their police powers to protect their local dairy farmers by regulating the price, distribution, and supply of milk. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949); *Milk Board v. Eisenberg Co.*, 306 U.S. 346 (1939); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Nebbia v. New York*, 291 U.S. at 502.

In the early 1930's, several states in the Northeast enacted state milk control laws to protect their local dairy farmers. These laws regulated the price, supply, and distribution of milk to increase the returns received by local dairy farmers above the federal market orders. In *Nebbia v. New York*, this Court upheld the state's power to protect the health and welfare of its citizens by regulating the distribution and price of milk produced *within* the state. *Nebbia*, 291 U.S. at 502 (emphasis added). The nature and extent of the regulation permitted, however, is limited by the Commerce Clause of the United States Constitution. See, e.g., *Baldwin v. G.A.F. Seelig*, 294 U.S. at 511.

The seminal case restricting the state's power to regulate the milk industry is *Baldwin*. In *Baldwin*, this Court held that a state, in the sole interest of protecting its dairy farmers, could not insulate its in-state milk industry from competition from other states. There, New York had established minimum milk prices to be paid by milk dealers to producers above the

federal market order price. For products originating within the state, this Court did not take issue with New York's minimum price law.⁵ Instead, it focused on that portion of the New York law which fixed a minimum price for milk which was imported from other states.

New York's purpose in extending its minimum price laws to milk produced in other states was to insulate local farmers from competition from neighboring states. Without that portion of the law, New York milk dealers would be encouraged to buy their milk out-of-state to avoid paying the artificially high in-state milk prices created by the statute. In effect, New York artificially raised the price of out-of-state milk so that out-of-state producers could not underprice the local product.

The *Baldwin* Court struck down New York's statutory scheme because the law unconstitutionally removed any economic incentive for a local distributor to purchase out-of-state milk and thereby encouraged its distributors first to consume the local supply of milk before turning to out-of-state sources. *Baldwin*, 295 U.S. at 511. Thus, the Court reasoned that out-of-state milk producers were denied an opportunity to compete with New York produced milk. *Id.* The Court concluded that New York's law set a barrier to traffic between one state and another in violation of the Commerce Clause. *Id.* at 521-522.

The *Baldwin* Court also specifically held that legitimate state power to regulate commerce for health and safety reasons could not be invoked to validate New York's price regulation. There, the Court would not accept state arguments concerning the preservation of the quality of milk as a guise for the protection of the economic welfare of the state's milk industry. The *Baldwin* Court stated:

⁵ The Petitioners do not contest the state's power to fix minimum prices for products originating with the state. Such regulations have been held to be constitutionally valid. *Nebbia v. New York*, 291 U.S. at 502.

If New York in order to promote the economic welfare of her farmers, ~~may~~ guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

Id. at 522. In other words, to allow the individual states to implement such regulations would open the door to state sponsored pricing wars, which is one circumstance that the Commerce Clause was designed to guard against. *See id.*

Since *Nebbia* and *Baldwin* were decided more than 50 years ago, this Court has continually intervened to define the constitutional boundaries of the state's power to protect its dairy industry consistent with the Commerce Clause. In numerous instances, this Court has held that states have exceeded their power, and therefore, has been compelled to strike down state statutes as violative of the Commerce Clause. *See, e.g., Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. at 361; *Dean Milk Co. v. Madison*, 340 U.S. at 349; *Hood & Sons v. Du Mond*, 336 U.S. at 525.

The economic downturn of the 1990's has triggered a flurry of activity from a number of states to implement price support systems to increase the returns that the states' local dairy farmers receive for their milk. Here, the state of Massachusetts has again tested the boundaries of the Commerce Clause by implementing a regulation which neutralizes the economic effects of free competition between the states. Once again, this Court's guidance is necessary to define the constitutional parameters of a state's ability to protect its local milk industry from the logical consequences of a free market.⁶

⁶The importance of this Court again reinforcing the vitality of the Commerce Clause is particularly timely as Europe continues to struggle towards a free market through the European Economic Community and the United States, Canada, and Mexico consider final approval of the North American Free Trade Agreement.

II. THE DECISION BELOW CLEARLY CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS REGARDING WHETHER STATES MAY IMPLEMENT PRICING ORDERS TO PROTECT THEIR LOCAL DAIRY FARMERS.

The perceived problem of the inadequacy of the minimum prices set by the federal marketing orders is not peculiar to Massachusetts. New York, Minnesota, and Maine⁷ have all implemented state pricing orders regulating the price of milk, and other states are contemplating instituting similar pricing orders to protect their own in-state farmers. While the Massachusetts court has proclaimed these pricing orders constitutional, New York and Minnesota federal courts have struck them down as violative of the Commerce Clause of the United States Constitution in accordance with *Baldwin*. *See Marigold Foods v. Redalin*, 809 F. Supp. 714 (D.Minn. 1992); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992).

In holding the Massachusetts Pricing Order constitutional, the Massachusetts Supreme Judicial Court has created an irreconcilable conflict with other decisions of the federal courts. *Compare West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture*, 415 Mass. at 8, 611 N.E.2d. at 239 with *Marigold Foods v. Redalin*, 809 F. Supp. at 714; *Farmland Dairies v. McGuire*, 789 F. Supp. at 1243.

In *Marigold Foods*, a federal court relying on *Baldwin* held that a Minnesota pricing order nearly identical to the Massachusetts Pricing Order was a *per se* violation of the Commerce Clause.⁸ Similarly, in *Farmland Dairies v. McGuire* a federal district court, relying on *Baldwin*, invalidated a law similar to the Pricing Order. In that case, a New York state regulation established a minimum price for New York produced milk,

⁷ *See Opinion of the Justices*, 601 A.2d 610 (Me. 1991).

⁸ The Massachusetts court did not attempt to distinguish the *Marigold Foods* case, and as a result, reached the erroneous conclusion that the Pricing Order does not violate the Commerce Clause.

and required dealers of non-New York milk to make "compensatory" payments for milk purchased at a lower price from dairy farmers outside of New York if such milk was sold in New York. The compensatory payments were made to an equalization fund and then distributed to New York dairy farmers only. The stated purpose of the regulation was to "promote market stability, reduce violent price fluctuations, and better ensure the availability of a quality milk supply throughout the state." *Farmland Dairies*, 789 F. Supp. at 1253.

The dairies argued that since the major purpose of the compensatory requirement was to protect the New York dairy industry and to cancel out the economic advantage that lower-priced non-New York milk would otherwise have over New York-produced milk, it violated the Commerce Clause. Relying on *Baldwin*, the court struck down the regulation holding that the compensatory payment scheme was a *per se* violation of the Commerce Clause: the purpose and effect of the regulatory scheme favored in-state interests over out-of-state interests, and as such, burdened interstate commerce.⁹ The court reasoned that the compensatory payments from dealers of non-New York milk allowed New York farmers to receive a higher

⁹The New York district court distinguished New York's unconstitutional milk pricing scheme from the constitutional "use tax" implemented in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In *Henneford*, this Court concluded that the use tax did not burden interstate commerce because it did not create a preference for Washington goods. The *Farmland Dairies* court distinguished *Henneford*, noting that Washington's sales tax "went to the general coffers of the state, not to the Washington retailers. The imposition of the tax did not benefit Washington retailers affirmatively, but rather removed the disadvantage caused by the sales tax." *Farmland Dairies*, 789 F. Supp. at 1252. Unlike the tax in *Henneford*, New York's compensatory payments, like the assessments under the Pricing Order, were distributed to in-state dairy farmers only. The New York court reasoned that the payments from dealers of non-New York milk did more than equalize the playing field. New York farmers received a higher price for their milk and were protected from suffering a corresponding reduction in sales. The court concluded that such compensatory payments constituted an impermissible burden on interstate commerce. *Id.* This Court should also conclude that the assessments under the Pricing Order create a similarly impermissible burden.

price for their milk without suffering a corresponding reduction in sales:

that protection necessarily came at the cost of out-of-state farmers with lower-priced milk, because the incentive to dealers to purchase such milk for distribution in New York was reduced or eliminated.

Id. at 1252-1253. The court further held, relying on *Baldwin*, that the regulation's purpose of protecting the state's milk industry was not sufficient to overcome the corresponding burden imposed by the regulation on interstate commerce. *Id.* at 1254.

The effect and purpose of the New York regulation struck down in *Farmland Dairies* are identical to the Massachusetts Pricing Order and the statute in *Baldwin*. Like the New York regulation, the Pricing Order establishes a minimum price to be paid by milk dealers to Massachusetts farmers.¹⁰ (A-41). The Pricing Order attempts to achieve this minimum price by requiring milk dealers to pay an assessment — the difference between \$15.00 and the Federal Order No. 1 price — into the Fund. (A-46). Like the New York statute, the Pricing Order requires distribution of these funds to in-state farmers only. (A-46, 47). Because the assessment is imposed on all milk sold in Massachusetts, milk dealers must pay the minimum Massachusetts price for all milk, even milk purchased out-of-state.¹¹

¹⁰The Massachusetts court's observation that the "pricing order does not establish a minimum price milk dealers must pay for milk . . ." *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10) is misleading. The fact is that the Pricing Order does effectively set the price: the market price goes to the dairy farmers and the Premium goes to the Fund. The market price plus the Premium equals the total price received by the Massachusetts farmers.

¹¹The Massachusetts court attempted to distinguish *Farmland Dairies* in a footnote. *West Lynn Creamery, Inc.*, 415 Mass. at 18 n.14, 611 N.E.2d. at 245 n.14 (A-12). Contrary to the Massachusetts court's scant treatment of *Farmland Dairies*,

As the Minnesota and New York federal courts have indicated, the constitutional infirmity of these state pricing orders lies in the teachings of *Baldwin*. Given the interstate nature of milk marketing in the United States, it is essential that there be consistency between the states regarding whether these state pricing schemes are constitutional. If some states, but not others, are permitted to enact pricing orders which burden interstate commerce, there will be a disruption in the interstate milk market and federal law regulating the milk industry will be undermined. This Court's guidance regarding the state's power to regulate interstate commerce is therefore imperative.

III. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND, IF LEFT UNDISTURBED, WILL UNDERMINE ESSENTIAL CONSTITUTIONAL RESTRAINTS ON STATE REGULATION OF INTERSTATE COMMERCE IN THE DAIRY INDUSTRY.

This Court has held that a two-step analysis should be utilized in determining whether a state law or regulation violates the Commerce Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). Where the statute regulates evenhandedly to effectuate a legitimate local public purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church*, 397 U.S. at 142. On the other

that case did not depend upon whether the New York law directly affected the supply of out-of-state milk. Rather, the New York court observed that the compensatory payments from dealers of non-New York milk allowed New York farmers to receive a higher price for their milk without suffering a corresponding reduction in sales. It was the elimination of the competitive advantage that non-New York farmers would have had but for the pricing order that swayed that court. See *Farmland Dairies*, 789 F. Supp. at 1252-1253. The Massachusetts court did not address this issue. See *West Lynn Creamery, Inc.*, 415 Mass. at 8, 611 N.E.2d. at 239 (A-1).

hand, if either a discriminatory purpose or discriminatory effect is discovered, this Court has applied a virtual *per se* rule of invalidity. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). State statutes that amount to "simple economic protectionism" are discriminatory in purpose and, therefore, are *per se* violations of the Commerce Clause. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992).

The purpose and effect of the Pricing Order and the statute in *Baldwin* are identical. The explicit, unambiguous language of the Pricing Order¹² and the Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry reveal that the Commissioner's purpose in enacting the Pricing Order is economic protectionism and discrimination against competition in the Massachusetts milk market. (See Appendix D to this Petition at A-51). In his Declaration of Emergency, for example, the Commissioner states:

. . . the industry is in serious trouble and . . . we must act on the state level to preserve our local industry, [and] maintain reasonable minimum prices for the dairy farmers [to] thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

(A-57). The Commissioner stressed that "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." (A-55). The Commissioner concluded:

¹²The Pricing Order states: ". . . Massachusetts producers are facing an emergency situation due to [the] Federally set price. . . . The terms and conditions of the Order take into consideration . . . the amount necessary for all sectors of the industry to yield a reasonable return on their product." (A-41).

In order to alleviate the situation facing our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England.

(A-56). By ordering an assessment on all milk sold within Massachusetts, and rebating it to Massachusetts farmers only, the Pricing Order discriminates against out-of-state farmers and the wholesalers¹³ who purchase from these farmers. The clear protectionist purpose of this transfer of millions of dollars to Massachusetts farmers is revealed by the cumbersome structure of the Pricing Order. That cumbersome structure — paying assessments into the Fund and then distributing the funds to the Massachusetts farmers — is deliberate. The Pricing Order is specifically designed to insulate Massachusetts dairy farmers from what otherwise would be lower priced out-of-state milk. It is precisely to establish this protectionist purpose that the Commissioner has built the cumbersome structure of his Pricing Order.

The Massachusetts court held that the Pricing Order is not a *per se* violation of the Commerce Clause, reasoning that the Pricing Order is “evenhanded in its application” because “[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund.” *West Lynn Creamery, Inc.*, 415 Mass. at 15-16, 611 N.E.2d. at 243 (A-9). This even-handedness argument, however, was considered and rejected by this Court in *Baldwin*. In *Baldwin*, this Court recognized that New York had not attempted to “prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont. . . .” *Baldwin*, 294 U.S. at 521. This Court also recognized that the New York law was even-

¹³ West Lynn and LeComte's, as previously stated, purchase ninety-seven percent of their milk from out-of-state farmers.

handed because it established the same minimum price for in-state and out-of-state milk. *Id.* This Court held, however, that the establishment of a minimum price applicable to out-of-state milk constituted an “unreasonable clog upon the mobility of commerce” because it attempted to protect in-state dairy farmers “from the cut prices and other consequences of competition.” *Id.* at 527. The Court concluded that the statute was unconstitutional because it “neutralize[d] the economic consequences of free trade among the states.” *Id.* at 526.

In light of *Baldwin*, the Massachusetts court's conclusion that the Pricing Order is “evenhanded” and therefore not a *per se* violation of the Commerce Clause is clearly erroneous. In fact, the out-of-state farmers, and the wholesalers who purchase from them, are in a worse position here than in *Baldwin*. In *Baldwin*, the Vermont farmers received the difference between the market price and the state minimum price. Here, that differential does not go to out-of-state farmers; it is paid over to the Massachusetts farmers instead. That exacerbates the constitutional problem.¹⁴

The Massachusetts court further reasoned that the Pricing Order is not a *per se* violation of the Commerce Clause because “[t]he end to be served [by the Pricing Order] is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers are unable to earn a living income.” *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d. at 245, citing *Baldwin*, 294 U.S. at 500 (A-15). The Massachusetts court surprisingly concluded that such an end is legitimate, despite the fact that the *Baldwin*

¹⁴ The court below distinguished *Baldwin*, erroneously concluding that the Pricing Order “does not manifest any preference for in-state milk over out-of-state milk.” *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d. at 243 (A-10). The court's conclusion was based on “the manner in which milk dealers are called on to contribute to the Fund.” *Id.* at 15, 611 N.E.2d. at 243 (A-9). The Pricing Order's cumbersome structure, however, cannot shield it from being invalidated. The relevant inquiry is whether the Pricing Order is discriminatory in purpose or effect.

Court specifically held that a state may not protect its local dairy industry under the guise of ensuring the health and safety of its citizens. *Baldwin*, 294 U.S. at 521-522.

Concluding that the Pricing Order does not discriminate against interstate commerce on its face, the court instead applied the lesser standard of scrutiny approved in *Pike v. Bruce Church*, 397 U.S. at 142. *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d. at 245 (A-13). Applying the *Pike* balancing approach, the court held that the Pricing Order burdened interstate commerce, but that this burden was "incidental given the purpose and design of the program." *Id.* at 17-18, 611 N.E.2d. at 244 (A-11).

Pike, however, requires an inquiry into whether the Pricing Order could be achieved with a lesser impact on interstate commerce. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471 quoting *Pike*, 397 U.S. at 142. The Massachusetts court, however, disregarded this aspect of the *Pike* analysis, despite the fact that there are many ways the state could subsidize its in-state dairy producers without violating the Commerce Clause. For example, the state could provide dairy farmers with tax subsidies from the General Fund or tax relief in the form of reduced property tax or income tax payments. The state could also provide less direct relief by increasing state aid to finance research into more efficient means of dairy production. In addition, as the Petitioners argued below, the Commissioner could have simply raised the price that dealers pay for Class I milk to in-state farmers. *Baldwin* does not prohibit any of these activities.

Neither the Commissioner nor the Massachusetts court, however, considered the availability of any less restrictive alternative to the Pricing Order. Massachusetts simply cannot require out-of-state dairy farmers, and the wholesalers who purchase milk from them, to finance the subsidization of Massachusetts dairy farmers when there exist perfectly legitimate constitu-

tional alternatives that do not burden out-of-state producers or interstate commerce.

CONCLUSION

Wherefore, the Petitioners West Lynn Creamery, Inc. and LeComte's Dairy, Inc. respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

MICHAEL L. ALTMAN

Counsel of Record

MARGARET A. ROBBINS

RUBIN AND RUDMAN

50 Rowes Wharf

Boston, Massachusetts 02110

(617) 330-7000

Counsel for Petitioners

July 13, 1993

Table of Appendices.

APPENDIX A

Opinion of Massachusetts Supreme Judicial Court in *West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture*, 415 Mass. 8, 611 N.E.2d 239

A1

APPENDIX B

Order of Massachusetts Supreme Judicial Court Staying Issuance of Rescript, No. SJC-06140 (June 9, 1993)

A15

Order of the Massachusetts Appeals Court Enjoining the Commissioner of Massachusetts Department of Food and Agriculture from Revoking Petitioners' Milk Dealers' Licenses, No. 92-J-827 (December 8, 1992)

A17

Memorandum and Order Denying Injunctive Relief, Superior Court Civil Action Nos. 92-4610G, 92-6914G, and 92-6924G (November 24, 1992)

A22

Amendment to Memorandum and Order Denying Injunctive Relief Entered on November 24, 1992, Superior Court Civil Action Nos. 92-4610G, 92-6914G, 92-6924G (November 25, 1992)

A25

Decision of Commissioner of Massachusetts Department of Food and Agriculture Revoking West Lynn Creamery, Inc.'s Milk Dealer's License, Administrative Docket Nos: MD-9202, MD-9301, MD-9347 (November 16, 1992)

A27

TABLE OF APPENDICES CONTINUED.

Decision of Commissioner of Massachusetts Department of Agriculture Revoking LeComte's Dairy, Inc.'s Milk Dealer's License, Administrative Docket Nos. MD-9303 and MD-9346 (November 16, 1992) A34

APPENDIX C

Amended Pricing Order, dated February 26, 1992 A41

APPENDIX D

Findings and Declaration of State of Emergency, Massachusetts Department of Food and Agriculture, dated January 28, 1992 A51

Commissioner's Declaration of Emergency A56

A1

Appendix A.

S-6140 SUPREME JUDICIAL COURT

WEST LYNN CREAMERY, INC. & another¹

vs.

COMMISSIONER OF THE
DEPARTMENT OF FOOD AND AGRICULTURE
(and two companion cases²).

SUFFOLK. January 6, 1993. – April 15, 1993.

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH,
& GREANEY, JJ.

Constitutional Law, Interstate commerce. Milk Control.

A milk pricing order pursuant to G. L. c. 94A, §§ 10-12, issued by the Department of Food and Agriculture, did not discriminate against interstate commerce so as to violate the commerce clause of art. 1, § 8, of the United States Constitution, where the order, having as its purpose the preservation of the viability of the milk industry in the Commonwealth, was not discriminatory on its face; where the order was applied evenhandedly to in-State and out-of-State dealers; and where the regulatory burden it imposed on interstate commerce, by requiring all licensed milk dealers to contribute, according to a prescribed formula, to an "equalization fund" for distribution to Massachusetts producers, was merely indirect and incidental. [14-19].

¹ LeComte's Dairy, Inc.

² West Lynn Creamery, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6914-G (judicial review of license revocation); LeComte's Dairy, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6924-G (judicial review of license revocation).

CIVIL ACTIONS commenced in the Superior Court Department, one on July 24, 1992, and two on November 18, 1992.

Motions for preliminary injunctive relief were heard by *R. Malcolm Graham, J.*, and *John L. Murphy, Jr., J.*, respectively.

After the latter two cases were reported to the Appeals Court by *J. Harold Flannery, J.*, the proceedings were consolidated for hearing in that court. The Supreme Judicial Court transferred them on its own initiative.

Michael L. Altman (*Margaret A. Robbins* with him) for the plaintiffs.

Eric A. Smith, Assistant Attorney General, for the defendant.

The following submitted briefs for amici curiae:

Robert J. Sherer & Francis A. DiLuna for Massachusetts Farm Bureau Federation.

Allen Tupper Brown for Massachusetts Association of Dairy Farmers & others.

Marshall M. Schribman for Massachusetts Cooperative Milk Producers Federation, Inc.

Steven J. Rosenbaum & Andrew I. Schoenholtz, of the District of Columbia, & *Richard M. Zielinski, Neil V. McKittrick & Joshua M. Davis* for Milk Industry Foundation.

NOLAN, J. The plaintiffs, West Lynn Creamery, Inc. (West Lynn), and LeComte's Dairy, Inc. (LeComte), are milk dealers licensed by the Department of Food and Agriculture (department) pursuant to G. L. c. 94A (1990 ed.).³ West Lynn is a

³The department defines a "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk."

domestic corporation with its principal place of business in Lynn. West Lynn purchases milk from producers and producer-cooperatives and sells in Massachusetts about sixty per cent of the milk purchased.⁴ West Lynn purchases most of its milk from out-of-State producers. LeComte is also a domestic corporation with its principal place of business in Somerset. LeComte purchases all of its milk from West Lynn and sells it to retailers, convenience stores, nursing homes, and restaurants.

Under G. L. c. 94A, the Commissioner of the department is vested with wideranging powers to supervise and regulate the milk industry of the Commonwealth. § 2. Among other things, the Commissioner is empowered to issue licenses to milk dealers, § 5, and to establish minimum prices to be paid for milk "which will best protect the milk industry in the commonwealth and insure a supply of pure, fresh milk adequate to cover consumer needs." § 10. The Commissioner fixes the minimum price to be paid to milk "producers" by issuing an order. §§ 11, 12. The Commissioner is empowered to suspend or revoke the license of a milk dealer who fails to comply with department orders, rules, or regulations. §§ 6, 7. The root of the dispute in the present cases is the Commissioner's revocation of the plaintiffs' milk dealers' licenses due to their failure to comply with a pricing order. The plaintiffs contend that the pricing order violates the commerce clause of art. I, § 8, of the United States Constitution.⁵ We disagree.

The order that is the subject of this case was issued by the Commissioner in response to the economic crisis facing dairy farmers in Massachusetts. The background to the issuance of the order is as follows. In November, 1991, a petition was

⁴The department defines a "producer" of milk as "any person producing milk from dairy cattle."

⁵The commerce clause provides that "congress shall have power to regulate commerce with foreign nations, and among the several states."

delivered to the department requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts. See G. L. c. 94A, § 12. The Commissioner held public hearings in January, 1992, conducted subsequent investigations, and interviews, and thereafter declared that the Massachusetts dairy industry was in a state of emergency.⁶

On February 26, 1992, in response to this state of emergency, the Commissioner issued an amended pricing order, pursuant to G. L. c. 94A, §§ 10-12.⁷ The pricing order sets forth a plan designed to boost the amount of money local dairy farmers — the producers — receive for milk above and beyond that required by the Federal program.⁸ The pricing order requires milk

⁶ The Commissioner declared that "an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens . . . the economy of our entire state, the enviable lifestyles we enjoy here, and the health of our consumers. . . ."

"The industry, nationwide, is in serious trouble, and ultimately a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry and its attendant benefits. While the dairy farmers receive prices for their product equal to those in 1978, the costs of producing milk continue to skyrocket out of their control. . . ."

"Dairying maintains hundreds of thousands of acres of open space and the scenic vistas on which our state's vital tourist industry depends. It generates millions of dollars into our economy in payroll, taxes and purchases, while providing a fresh and nutritious food product at a fraction of the price paid by consumers elsewhere in the nation and the world."

"Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem."

⁷ The Commissioner's first order was issued on February 18, 1992. The amended order was issued "for technical, clarification purposes." The February 18, 1992, order is not at issue on this appeal.

⁸ The preamble to the pricing order provides: "The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices. This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their

dealers to submit monthly reports and to contribute to the Massachusetts Dairy Equalization Fund (fund). The monthly reports require, among other things, each licensed milk dealer to report the amount of "Class I" milk sold for consumption in Massachusetts during the reporting period.⁹ Each milk dealer's monthly contribution to the Fund is calculated by multiplying the volume of "Class I" milk sold during the reporting month, regardless of point of origin, by an "Order Premium."¹⁰ The Commissioner distributes the fund to producers in proportion to the milk produced in Massachusetts during the preceding month. The pricing order took effect immediately. The first monthly report, covering April, 1992, was due May 25, 1992.

West Lynn and LeComte submitted reports for the periods April through July, 1992. The plaintiffs paid their premiums for April and May, but discontinued payments thereafter. On July 24, 1992, the plaintiffs filed an action in the Superior Court Department alleging, among other things, that the pricing order violated the commerce clause. They argued that the pricing order places out-of-State farmers at a competitive disadvantage because it subsidizes Massachusetts farmers but not out-of-State farmers, all of whom are selling milk in Massachusetts, and sought declaratory relief, damages, a preliminary injunction, and a permanent injunction to prevent the Commissioner from collecting the monthly premiums. On July 31, 1992, a judge in the Superior Court denied the plaintiffs'

product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk."

⁹ The "Class I" designation refers to milk consumed as fluid rather than processed into other products, e.g., cheese.

¹⁰ The pricing order establishes a target price for milk. The order premium is equal to one-third of the difference between the target price and the so-called "blend price" reported monthly by the United States Department of Agriculture. In the pricing order the Commissioner fixed the target price at \$15 a hundred pounds of milk (hundredweight or cwt.). Assuming that the federally mandated price is \$12 a cwt., the order premium would be \$1.

request because they had failed to establish irreparable harm. The judge also denied their request to deposit the required premiums with the court.¹¹

Meanwhile, West Lynn and LeComte continued to dispute the legality of the pricing order, and failed to comply with its provisions. In June and July, 1992, the Commissioner initiated administrative action against both West Lynn and LeComte seeking to suspend or to revoke their licenses for failing to comply with the pricing order.

In response to the Commissioner's action, on August 7, 1992, plaintiffs filed an "emergency" motion for a preliminary injunction seeking the same relief that the earlier motion sought: a preliminary injunction enjoining the Commissioner from imposing any penalty, including but not limited to, suspending or revoking their milk dealers' licenses for failure to pay the equalization premiums required by the Commissioner's amended pricing order. On August 14, 1992, the judge denied the requests for preliminary injunctive relief because the plaintiffs again failed to demonstrate any irreparable harm. The judge held that payment into the fund does not constitute irreparable harm because the pricing order does not require the plaintiffs to absorb the cost of the equalization premiums. Rather, the judge reasoned, the plaintiffs can pass on the equalization premiums to consumers. The judge also noted that, if the Commissioner should suspend or revoke the plaintiffs' licenses, his decision is reviewable, G. L. c. 94A, § 8; hence, their claim was premature.

On September 14, 1992, the Commissioner held hearings, and on November 16, 1992, conditionally revoked the plaintiffs' licenses, see G. L. c. 94A, §§ 6, 7, for failing to comply

¹¹ The plaintiffs assert that, once the payments are paid into the fund and distributed to Massachusetts dairy farmers, there is no practical remedy for recouping the funds if the pricing order is found to be unconstitutional.

with the pricing order.¹² The Commissioner denied the plaintiffs' commerce clause challenge, stating, "[W]hile the [Pricing] Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied evenhandedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states."

On November 17, 1992, the plaintiffs filed a second emergency motion for a preliminary injunction requesting that the Superior Court enjoin the Commissioner from revoking their licenses. In an affidavit supporting its motion, West Lynn stated that it did not intend to comply with the conditions of the Commissioner's November 16, order. West Lynn also noted that, if it is not licensed to sell milk in the Commonwealth, more than 1,000 employees may be laid off. Additionally, on November 18, 1992, the plaintiffs filed separate actions in the Superior Court seeking judicial review of the Commissioner's decisions to revoke the plaintiffs' milk licenses, G. L. c. 94A, §§ 8, 21, and requesting stays of enforcement action pending judicial review.

On November 24, 1992, a Superior Court judge, in a consolidated order, amended on November 25, denied the plaintiffs' second request for an emergency preliminary injunction, and their request for a stay of the revocation action pending judicial review. The judge reasoned that the plaintiffs had failed to demonstrate a reasonable likelihood of success on the merits and that they would suffer irreparable harm. The judge wrote that the plaintiffs should "pay the assessment [premium] and seek an early hearing on the merits." The plaintiffs then

¹² The Commissioner conditioned revocation of the licenses on continuing non-compliance with the pricing order. The Commissioner's revocation order was effective fourteen days after issuance.

petitioned a single justice of the Appeals Court, G. L. c. 231, § 118, 1st par. (1990 ed.), seeking interlocutory relief from the Superior Court's denial of the emergency motion for a preliminary injunction. On November 25, 1992, the single justice issued an order staying the Commissioner's November 16, 1992, revocation orders pending further review. After a hearing on December 1, 1992, the single justice agreed to extend the stay beyond December 15, 1992, if the plaintiffs paid the amounts due under the pricing order for the months June, July, and August, 1992.

On December 11, 1992, another judge in the Superior Court, reserved and reported the plaintiffs' cases concerning judicial review of the Commissioner's revocation orders to the Appeals Court. See Mass. R. Civ. P. 64, 365 Mass. 831 (1974). On December 15, 1992, the Appeals Court granted a motion to consolidate the three cases.

To expedite the appeals, the parties agreed, with the assent of the single justice, to seek interlocutory relief from a panel of the Appeals Court pursuant to G. L. c. 231, § 118, 2d par. We transferred these cases to this court on our own motion, and we hold the pricing order constitutional.

The sole question facing us from the three appeals concerns the constitutionality of the pricing order. It is long established that, while a literal reading of the commerce clause evinces a grant of power to Congress, it "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.*, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). If the Commissioner's pricing order discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the Commissioner

"to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986), citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Justification supporting a discriminatory measure is subjected to strict scrutiny. *Id.* at 138, 144. In cases where the regulatory measure under study amounts to "simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." *Wyoming v. Oklahoma*, *supra* at 800, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

On the other hand, if the pricing order has only indirect or incidental effects on interstate commerce, it will be found to violate the commerce clause only if the burdens imposed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine v. Taylor*, *supra* at 138, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court has applied reduced scrutiny in such cases, but there is no clear line separating close cases on which scrutiny should apply. See *Wyoming v. Oklahoma*, *supra* at 800 n.12, and cases cited.

As one would expect, the plaintiffs contend that the Commissioner's pricing order is discriminatory on its face, and argue in favor of the application of strict scrutiny. The Commissioner contends that we should review the matter with reduced scrutiny because the pricing order burdens interstate commerce incidentally, if at all. We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund.

All milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund. Accordingly, the pricing order does not favor in-State milk dealers to the detriment of its out-of-State competitors. In this regard, then, the pricing order is evenhanded in its design and effect.

The pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935). Rather, the milk dealer's premium, as required under the pricing order, is fixed only by the Commissioner's target price, the federally mandated price, and the amount of milk the dealer sells for consumption in Massachusetts. See *supra* at 11-12 & note 10. A milk dealer's required premium is independent of the price the milk dealer has paid for the milk or the milk's point of origin. In this way the pricing order does not manifest any preference for in-State milk over out-of-State milk.

The pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers. On the contrary, milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs. As noted above, the premium required under the pricing order is independent of the price paid for the milk or its point of origin.

Further, the plaintiffs argue that the pricing order denies out-of-State milk producers the opportunity to compete with in-State milk producers because out-of-State milk, if sold in Massachusetts, is subject to the Massachusetts premium. Assuming, without deciding, that the plaintiffs, as milk dealers, have standing to raise this challenge, the argument is without merit. For the reasons mentioned above, we are not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers.

The Commissioner's pricing order was designed to aid only Massachusetts producers. Indeed, Massachusetts producers are entitled to disbursements from the fund based on the volume of milk produced, to the exclusion of its out-of-State competitors. The plaintiffs contend that this discriminatory distribution plan burdens interstate commerce because it will cause less out-of-State milk to be imported into Massachusetts. As

Massachusetts farmers receive more and more money from the fund, the plaintiffs argue, Massachusetts producers will produce more milk, and local production will then constitute a greater percentage of the total milk sold in Massachusetts.

Again we assume, without deciding, that the plaintiffs have standing to assert such a challenge. We concede that the fund distribution scheme affects interstate commerce in this manner but it does so only incidentally. Contrary to the assumption underlying the plaintiffs' argument, it is clear from the Commissioner's "Report Subsequent to Public Hearing" on the state of the dairy industry in Massachusetts, that fund distributions represent an infusion of capital designed solely to save an industry from collapse.¹³ Given the Commissioner's report and the balance of the record, we cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers.

This is not to say, however, that the fund distribution plan is without its adverse impact on interstate commerce. Common sense necessitates a contrary conclusion. The fund distribution scheme does burden out-of-State producers, to the extent that these producers are not entitled to receive fund disbursements, but we hold that the burden is incidental given the purpose and design of the program.

The plaintiffs' reliance on *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, is misplaced. *Baldwin*, like the present case, involved

¹³ The Commissioner found that the dealers' evidence did not support their claim that the order would affect the price out-of-State producers received from Massachusetts dealers. He further rejected the claim that the order would increase milk production by Massachusetts producers. He found that the record showed that Massachusetts producers had decreased production since the order had gone into effect. The Commissioner reasoned that the prediction of an increase of production was "speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers."

milk dealers and State regulation of milk prices. The *Baldwin* regulation, however, differs from that under study in the present cases. In *Baldwin*, the United States Supreme Court found unconstitutional a regulation that prohibited State licensed milk dealers from selling milk produced out-of-State unless the out-of-State milk producers were paid New York's minimum price for the milk. *Baldwin v. G.A.F. Seelig, Inc.*, *supra* at 519. Justice Cardozo wrote, "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.* at 522.

The constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation. While the pricing order in the present case was born of a similar concern for the dairy farmer, the support system that the Commissioner has promulgated, as discussed above, cannot fairly be said to be discriminatory or protectionist as was the one at issue in *Baldwin*.¹⁴

In the present case, "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Id.* at 523, citing *Nebbia*

¹⁴The plaintiffs also direct our attention to *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1248 n.5 (S.D.N.Y. 1992), in support of its argument. To the extent that we can discern from the opinion, it is inapposite. *McGuire*, like the present cases, involved State pricing regulation of the milk industry. Like *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and with similar fate, the State involved was New York. The fact distinguishing *McGuire* from the present case is that the price New York State farmers were paid for milk "increased proportionately with the amount of non-New York Class I milk sold in New York." *Id.* at 1248 n.5. Thus the *McGuire* pricing order provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses. As the *McGuire* court found, a regulatory scheme tilted in such a fashion to benefit in-State interests impermissibly burdens interstate commerce. *Id.* at 1254.

v. New York, 291 U.S. 502 (1934). Such an end is legitimate. See *Baldwin*, *supra* at 519. The power of the Commonwealth to regulate the milk industry within its borders is clear. See *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1251 (S.D.N.Y. 1992) (State is empowered to fix minimum prices for milk sold by dairy farmers within its borders), citing *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 378 (1964). The premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay. The Commissioner's pricing order may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts. While this may be the case, relief is beyond our province.

In view of the merely incidental burden on interstate commerce, the end to which the pricing order is aimed, and the resultant benefit to the Commonwealth's dairy industry, we conclude that local benefits outweigh any incidental burden on interstate commerce and hold that the pricing order does not violate the commerce clause. We remand the cases to the Superior Court for action not inconsistent with this opinion.

So ordered.

A14

A15

APPENDIX B.

**SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS**

1412 Courthouse,
Boston, Massachusetts 02108
(617) 557-1020

Michael L. Altman, Esquire
Rubin and Rudman
50 Rowes Wharf
Boston, MA 02110

Re: No. SJC-06140

WEST LYNN CREAMERY, INC., & another

v.

**COMMISSIONER OF THE DEPARTMENT OF FOOD
AND AGRICULTURE (and two companion cases)**

NOTICE OF DOCKET ENTRY

Please take note that on June 9, 1993, the following entry was made on the docket of the above-referenced case:

ORDER: Pursuant to the Standing Order dated March 29, 1988, the Emergency Motion for Stay of Issuance of Rescript, Request for Oral Argument and Motion for Stay of Any Order (papers 9, 10 and 11), the Court has considered the motions and they are hereby allowed. The request for oral argument is denied.

Jean M. Kennett,
Clerk

Dated: June 9, 1993

A16

To: Michael L. Altman, Esquire
Eric A. Smith, Esquire
Richard M. Zielinski, Esquire
Atty. Steven J. Rosenbaum
Allen Tupper Brown, Esquire
Robert J. Sherer, Esquire
Marshall M. Schribman, Esquire
Atty. Daniel J. Smith

A17

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-J-827

WEST LYNN CREAMERY, INC. and
LeCOMTE'S DAIRY, INC.

vs.

COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE
(and two companion cases).

ORDER

These cases come before me under G. L. c. 231, § 118, par. 1. The petitioners seek relief from an order entered in the Superior Court on November 24, 1992, denying their motions for preliminary injunctions to stop the revocations on December 1, 1992, of their milk dealer's licenses. On November 25 I entered an order staying the revocations pending disposition of West Lynn Creamery's and LeComte's Dairy petition for review.

The threatened revocations were based on the failure of the two dealers to make payments for the months of June and July, 1992, into the Massachusetts Dairy Equalization Fund, established by an "Amended Pricing Order" entered February 26, 1992. This was an emergency order intended to infuse cash into Massachusetts dairy farms (producers), which were faced with the danger of extinction due to rising costs of production and falling Federal milk price-supports. The pay-

ments by milk dealers into the fund were to be based on a formula computed on the basis of a differential between a target price calculated to stabilize the market and the so called "zone 21 blend price" reported monthly by the United States Department of Agriculture, multiplying the difference by the amount of milk sold monthly for consumption in Massachusetts, calculated in pounds. The fund is distributed monthly to Massachusetts producers in relation to their monthly production (up to a 200,000 pound limit).

From an affidavit furnished by the Commissioner, it appears that dealers generally complied with the amended price order at the outset until West Lynn Creamery and LeComte's Dairy refused to make the payments due for June and July. The result was a shortfall in the fund for distribution in July and August. By October most dealers were refusing to pay their monthly assessments, and the fund is apparently now inoperative. The Commissioner entered orders on November 16 revoking the licenses of West Lynn Creamery and LeComte's Dairy for failure to make payments for June and July. The orders were not to take effect until December 1 and would not take effect at all if the two dealers were to make the required payments for June and July and were to file reports for the subsequent months, with the required payments, by December 1. On November 17 the dealers filed petitions for judicial review of the revocation orders under G. L. c. 94A, §§ 8 and 21, and, in conjunction therewith, sought the preliminary injunctive relief that was denied in the Superior Court.

The dealers' contention is that the pricing orders establishing the Equalization Fund are invalid under the Commerce Clause of the United States Constitution. They argue that they will suffer irreparable harm if they are made to pay their mandated assessments into the fund because the amounts paid in are distributed to producers by the fifth day of the succeeding month and will be unrecoverable as a practical matter. At the

hearing before me they offered to pay into court, to be held in escrow pending determination of their petitions for review, the amounts that were due through November 25, 1992, which apparently total \$367,343 in the case of West Lynn Creamery and \$11,732 in the case of LeComte's Dairy.

The escrow solution is not acceptable to the Commissioner or to the producers (as represented by various amici curiae, such as the Massachusetts Farm Bureau Federation and the Massachusetts Assn. of Dairy Farmers) in light of the emergency existing among the producers, most of which are small or small to moderate sized dairy farms, and in light of their position that the money was raised, in practical effect from Massachusetts consumers and is equitably owned either by them or by Massachusetts farmers (if the price order is valid) but in no event by the dealers, who, the producers contend, would receive a windfall because they have priced milk for Massachusetts consumption so as to recover the cost of the Equalization Fund assessments.

The only clear aspect of this complicated picture is that the public interest would best be served by the earliest possible resolution of the underlying Constitutional issue. The Equalization Fund is presently inoperative, and dairy farmers are being penalized unfairly if the Amended Price Order is valid and should be enforced. To empower the Commissioner to enforce the price order solves the farmers' problem but is unfair to both Massachusetts consumers and out-of-State producers if the entire pricing scheme is, as the dealers argue, unconstitutional. The continuing uncertainty is prejudicial to dealers, who must set current prices in ignorance whether they will ultimately have to pay the Equalization Fund assessments. A speedy determination of the underlying Constitutional is the fairest solution for all parties.

At the hearing the court discussed with counsel the possibility of an early resolution through the vehicle of an interlocutory

appeal under G. L. c. 231, § 118, par. 2, from the order denying the preliminary injunction. As the pending petitions for review are governed by Administrative Procedure Act principles, with little or no role for fact-finding by the court, such a resolution seemed plausible. In response to the court's request that counsel confer amongst themselves and advise the court, I have been informed that counsel for the parties are in agreement on such a course. They have suggested the following accelerated briefing schedule: the dealers' briefs will be submitted on December 9, 1992; the Commissioner's brief on December 17; and the dealer's reply brief, if any, by December 22. The court accepts this schedule and has set the case¹ down for argument at 10:00 A.M., Tuesday, December 29, 1992.

Pending resolution of the appeal, taking into account the likelihood of success on the merits and balancing the hardships and equities to all parties, the court declines (as did the Superior Court judge, Murphy, J.) to stay beyond December 15 the Commissioner's decisions in the license revocation proceedings, as those decisions apply to the assessments that were required to be paid for June (due July 25, 1992), July (due August 25), and August (due September 25), during which times the majority of the milk dealers were paying their assessments into the Equalization Fund. If those payments are made to the Department prior to December 16, the stay of the license revocation decisions that was entered in this court on November 25 will remain in effect pending determination of the appeal, subject to further order by the panel that hears the appeal.²

There was some confusion at the hearing concerning the status of certain persons and organizations other than West

¹ The court assumes, of course, that the appeal from the Trial Court's order denying the injunction has been filed and that the appeal will be entered in this court.

² For the sake of clarity, the court states (1) that it has placed no restriction on the Commissioner in the distribution of amounts paid to the Department for the Equalization Fund, and (2) that it is not at this time ordering that the assessments due for September and October be placed in escrow with the court.

Lynn Creamery, LeComte's Dairy, and the Commissioner of Agriculture. Prior to the hearing the court allowed several motions to file amicus briefs or memoranda. (These were received and the attorneys involved were heard in argument.) It was not the court's intention to allow any motion to intervene. Any such allowance is vacated. For purposes of the appeal this court will treat as parties only those who are parties in the Superior Court proceeding. However, all persons or organizations that were permitted to file amicus briefs in the single justice proceeding are hereby authorized to file amicus briefs in the appeal. Argument by amici will be in the discretion of the panel that hears the appeal. Rule 17 of the Mass. Rules of App. Procedure applies, except that amicus briefs may be filed up to and including December 22.

By the Court
(Armstrong, J.),

Assistant Clerk

Entered: December 8, 1992.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTIONSWEST LYNN CREAMERY, INC. and
LeCOMTE'S DAIRY, INC.

vs. NO. 92-4610G

GREGORY C. WATSON, COMMISSIONER,
MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE

WEST LYNN CREAMERY, INC.

vs. NO. 92-6914G

GREGORY C. WATSON, COMMISSIONER

LeCOMTE'S DAIRY, INC.

vs. NO. 9224G

GREGORY C. WATSON, COMMISSIONER

MEMORANDUM AND ORDER DENYING
INJUNCTIVE RELIEF

The plaintiffs process, package and/or sell milk under license of the Massachusetts Department of Food and Agriculture.

The defendant Watson is the Commissioner of the Department.

On January 28, 1992, the Commissioner, acting pursuant to G.L. c. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry and issued an Amended Pricing Order on February 26, 1992.

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Liquidization Fund. The amounts deposited are then distributed to dairy farmers in the Commonwealth.

For the purposes of this proceeding, the three (3) captioned cases will be considered as a single action.

The plaintiff West Lynn Creamery, Inc. (West Lynn) did not pay the assessment due on July 25, 1992 nor in the months thereafter. Neither did LeComte's Dairy, Inc. and some other milk dealers.

After notice, the Commissioner conducted a hearing on September 14 1992 and by a Decision dated November 16, 1992, conditionally revoked West Lynn's milk dealers license for failure to pay the assessment required by the Pricing Order. The license will be revoked on December 1, 1992 unless the assessment is paid.

The plaintiffs are requesting a preliminary injunction to enjoin the Commissioner from revoking West Lynn's and LeComte's milk dealers licenses on that date.

In its Petition For Review, West Lynn asserts that it does not intend to comply with the conditions imposed by the November 16, 1992 Order of the Commissioner because it believes that those conditions violate the Commerce Clause of the United States Constitution. It further states that if it is not licensed to sell milk in the Commonwealth after December 1, 1992, more than 1,000 employees may be laid off.

This position is confirmed by an affidavit of one of the principal owners and Executive Vice President for Sales and Marketing delivered to the court this morning.

A24

This is a choice West Lynn must make. A more reasonable approach might be to pay the assessment and seek an early hearing on the merits.

After considering the arguments, briefs and other well prepared submissions of counsel and studying the findings, declarations, orders and decisions of the Commissioner of the Massachusetts Department of Food and Agriculture, the plaintiffs have not demonstrated a reasonable likelihood of success on the merits or that they would suffer irreparable harm if injunctive relief was not granted.

ORDER

Accordingly, it is **ORDERED** that entry be made **DENYING** PLAINTIFF'S SECOND EMERGENCY MOTION FOR PRELIMINARY INJUNCTION dated November 17, 1992.

John L. Murphy, Jr.
Justice of the Superior Court

DATED: November 24, 1992

A25

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
No. 92-4610-G**

**WEST LYNN CREAMERY, INC.
and
LECOMTE'S DAIRY, INC.**

vs.

**GREGORY WATSON, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF FOOD AND
AGRICULTURE**

SUFFOLK, ss.

**CIVIL ACTION
No. 92-6914-G**

WEST LYNN CREAMERY, INC.

vs.

**GREGORY WATSON, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF FOOD AND
AGRICULTURE**

SUFFOLK, ss.

**CIVIL ACTION
No. 92-6924-G**

LECOMTE'S DAIRY, INC.

vs.

**GREGORY WATSON, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF FOOD AND
AGRICULTURE**

AMENDMENT TO MEMORANDUM AND ORDER
DENYING
INJUNCTIVE RELIEF ENTERED ON NOVEMBER
24, 1992

The fourth paragraph of the above mentioned Memorandum and Order is amended by striking the word "Liquidation" and inserting in place thereof the word "Equalization" so that the sentence reads:

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Equalization Fund.

SO ORDERED.

John L. Murphy, Jr.
 Justice of the
 Superior Court

DATED: November 25, 1992

IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS:
 MD-9202, MD-9301, MD-9347

Arthur Pappathanasi
 President
 West Lynn Creamery, Inc.
 626 Lynnway
 Lynn, MA 01905

DECISION

Re: Dealer Name: West Lynn Creamery, Inc.
 Revocation of Milk Dealer License No: 191

INTRODUCTION

1. This decision is rendered after a full and fair hearing held in order to determine if there is cause to suspend or revoke the milk dealer's license of West Lynn Creamery, Incorporated. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that West Lynn Creamery, Inc., failed to comply with the Commissioner's Amended Pricing Order.

JURISDICTION

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

PARTIES

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Common-

wealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. West Lynn Creamery, Inc., (hereafter "West Lynn") is a company with a principal place of business located at 626 Lynnway, Lynn, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

FINDINGS

5. A show cause hearing was held on September 14, 1992 to determine whether there was sufficient cause to suspend or revoke West Lynn's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9347, MD-9301, and MD-9202 dated September 9, 1992, incorporating by reference the earlier notices received by West Lynn, was received by West Lynn on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of

State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including West Lynn.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On July 2, 1992, the Department received a May Monthly Reporting Schedule and required payment from West Lynn, due for the month of June. Pursuant to the Order, the May Monthly Reporting Schedule was due on June 25, 1992. West Lynn failed to attach the list of sales to other dealers and the May 1992 Federal Market Administrator's Form No. 1, as required by the Order.

13. On July 24, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the June Monthly Reporting Schedule

and payment were due on July 25, 1992. West Lynn failed to attach the list of sales to other dealers and the June 1992 Federal Market Administrator's Form No. 1, as required by the Order.

14. On August 26, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992, however, the Department considered that the Schedule was timely filed.

15. On August 31, 1992, West Lynn submitted amended Reporting Forms for the months of June and July, as well as the May, June and July Federal Market Administrator's Form No. 1, as required.

16. As of the date of the hearing, West Lynn failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

17. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, West Lynn has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

18. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

19. West Lynn's failure to comply with the Order was a significant factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

20. West Lynn contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

21. The defense offered by West Lynn fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

22. It appears that West Lynn bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that West Lynn has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

23. West Lynn's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the

record. This claim is based on the underlying assumption that Massachusetts farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums paid to out-of-state farmers to decline is not supported by the evidence.

24. West Lynn also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of West Lynn Creamery, Inc. is hereby revoked, effective on the fourteenth day following receipt of this decision, unless prior to that date West Lynn complies with the following:

A. files a completed monthly reporting schedule and submits an accompanying payments for the month of July, 1992; and

B. files completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(f).

EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON
COMMISSIONER

IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS:
MD-9303 and MD-9346

President
LeComtes/All Star Dairy, Inc.
PO Box 57/500 Wood Street
Somerset, MA 02726

DECISION

Re: Dealer Name: LeComtes/All Star Dairy, Inc.
Milk Dealer License No: 114

INTRODUCTION

1. This decision is rendered after a hearing held in order to determine if there is cause to suspend or revoke LeComtes/All Star Dairy, Inc.'s milk dealer's license. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that LeComtes/All Star Dairy, Inc., failed to comply with the Commissioner's Amended Pricing Order.

JURISDICTION

2. Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

PARTIES

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Commonwealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. LeComtes/All Star Dairy, Inc. (hereafter "Respondent") is a corporation which operates as a milk dealer, with a place of business in Somerset, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

FINDINGS

5. A show cause hearing was held on September 14, 1992 in order to determine whether there was sufficient cause to suspend or revoke Respondent's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9346 and MD-9303, dated September 9, 1992, incorporating by reference the earlier notices received by Respondent, was received by Respondent on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. c. 94A §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including Respondent.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On June 29, 1992, the Department received a May Monthly Reporting Schedule, with the required payment, from Respondent, due for the month of May. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on June 25, 1992.

13. On July 25, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of June. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992.

14. On August 4, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of July. Pursuant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992.

15. As of the date of the hearing, Respondent failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

16. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, Respondent has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

17. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

18. Respondent's failure to comply with the Order was a contributing factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

19. Respondent contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

20. The defense offered by Respondent fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly

to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

21. It appears that Respondent bases its Commerce Clause defense on alleged discrimination between in-state producers and out of state producers. Assuming, without deciding, that Respondent has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

22. Respondent's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts' farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums

paid to out-of-state farmers to decline is not supported by the evidence.

23. Respondent also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of LeComtes/All Star Dairy is hereby revoked, effective on the fourteenth day following receipt of this Decision, unless prior to that date Respondent complies with the following:

A. submits a completed monthly reporting schedule and submits an accompanying payment for the month of June and July, 1992; and

B. submits completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

All submissions are to be made during business hours at the offices of the Department of Food and Agriculture, Room 2103, 100 Cambridge Street, Boston, Massachusetts.

RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(7).

EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON
COMMISSIONER

APPENDIX C.AMENDED PRICING ORDER

Pursuant to Massachusetts General Laws Chapter 94A Sections 10, 11, and 12, the Commissioner hereby Orders that each licensed milk dealer comply with the following Pricing Order:

I. Preamble

The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices.

This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk.

II. Definitions

- A. The terms used in this Order shall be defined in accordance with M.G.L. c. 94 and 94A, and for the purpose of this Order, the following words shall have the following meanings:

Committee: The Massachusetts Dairy Industry Committee.

Dealer: any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.

Dealer-retailer: a person who is a dealer and who also sells at retail the milk handled for sale, shipment, storage or processing within the Commonwealth.

Producer: any person producing milk from dairy cattle.

Producer-Dealer: a dealer who also produces a portion or all of the milk they handle.

Sub-dealer: any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

III. Massachusetts Dairy Industry Committee

- A. The Commissioner shall establish the Massachusetts Dairy Industry Committee to assist in administration of this Order, and advise the Commissioner on pursuit of a regional milk marketing strategy.
- B. The Commissioner shall request that a representative from each of the following sectors of the milk industry

participate on the Committee chaired by the Commissioner, or his designee: a dairy farmer, a co-operative representative, a milk dealer, a producer-dealer, a retailer, and a member of the Board of Agriculture. The Secretary of the Executive Office of Consumer Affairs or their designee, and the Secretary of the Executive Office of Economic Affairs or their designee may sit on the Committee as additional advisory members.

- C. Every three months, the Department shall submit a summary of the monthly reports and any other relevant information to the Committee to assist the Committee in its advisory capacity.
- D. The Committee may provide advice to the Commissioner regarding the implementation and administration of this section, and may provide the Commissioner with a biannual review of the dairy industry.

IV. Monthly Reporting Schedules

- A. Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month, commencing with the month of May, for the reporting month of April.
- B. The Monthly Reporting Schedule shall be a form provided by the Department, which shall include, but not be limited to the following information:
 - (1) the amount, in pounds, of Class I milk sold for consumption in Massachusetts during the past month,

not including sales to another Massachusetts licensed dealer;

- (2) the amount, in pounds, of fluid milk received from each Massachusetts producer during the past month.
 - (3) the amount owed to the Fund as calculated according to the formula in paragraph V of this Order.
- C. Every Massachusetts producer who holds a valid certificate of registration, and does not ship milk to a milk dealer licensed by the Department, or to a co-operative, must provide the Department, by the twenty fifth day (25th) of each month, a statement of the amount of milk produced and sold during the previous month and proof of such amount.

V. Pricing Order Fund

- A. Every dealer, as defined in this Order, is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts. In cases where the same milk is handled by more than one dealer, the dealer which is the final entity to handle said milk for wholesale or retail sale within the Commonwealth shall be deemed to be the dealer required to report such sales.
- B. In calculating the amount owed in paragraph IV. B. 3. of this Order, the following formula shall be used:

(1) Calculation of the Order Premium

$$\frac{15.00 - \text{Blend}}{3} = \text{Order Premium}$$

where,

Blend = The blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 price for the second preceding month (i.e.: for the reporting month of April, use February Blend,) plus any state mandated premium.

(2) Calculation of the Premium Payment

Order Premium \times Amount sold for Class I utilization, calculated in paragraph IV. B. (1) = Premium Payment.

VI. Order Distributions

- A. The Commissioner, shall direct that monthly distributions from the Fund are made by the fifth (5th) day of each month, commencing with the month of June, in the following manner:
 - (1) Payment shall be made directly to every Massachusetts producer based upon their proportion of milk produced in Massachusetts according to the following formula:

$$A/E = W$$

$$F \times W = \text{amount distributed to the Massachusetts producer}$$

where,

A = amount, in pounds, produced by the producer for the reporting month, except that in no case shall the amount in "A" exceed two hundred thousand (200,000) pounds.

E = the total monthly sum, in pounds, of milk produced in Massachusetts.

W = proportion of producer's contribution to Massachusetts milk production

F = amount, in dollars, in the Order fund for the reporting month

- (2) In no case shall the distribution to the producer exceed the figure determined in (3) below.
- (3) The maximum distribution to the producer shall be determined by according to the following formula:

$$\$15.00 - \text{Blend} = T$$

$T \times A$ = maximum amount which can be distributed to the Massachusetts producer

Blend = the blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 for the second preceding month.

T = Target Differential

A = amount, in pounds, produced by the producer except that in no case shall this figure exceed two hundred thousand pounds.

B. All amounts received pursuant to this Order shall be distributed by the Commissioner for the purposes of this Order only and all amounts paid shall be distributed directly to Massachusetts producers, except those amounts returned to the licensed dealers in accordance with paragraph C, below.

C. After the Order amount has been distributed to every Massachusetts producer, the Commissioner shall direct that the remaining balance be distributed directly to the licensed dealers, based upon each dealer's proportionate contribution to the total fund on or before the fifth (5) day of the month.

D. Adjustments:

1. Whenever verification of reports or payments of any dealer discloses errors made in payments to or from the Fund, the Department shall promptly notify such dealer of any unpaid amount, and such dealer shall, within five (5) days, make payment of the amount so billed. Whenever verification discloses that payment is due from the Fund to any dealer, the Commissioner shall, as promptly as possible, direct that such payment be made.

2. Whenever the Commissioner is required to make payments to a dealer pursuant to the provisions of this Order, and any amount is due from the dealer to the Fund for the same payment period, the Commissioner may issue a credit to the dealer for the amount of the payment in lieu of the payment in order to balance the amounts owed.

VII. Enforcement

- A. In the event that a producer or milk dealer provides false information or attempts to misrepresent information required pursuant to this section, or fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted.
- B. Any person found in violation of any provision of this Order shall be subject to civil or criminal penalties pursuant to M.G.L. c. 94A section 22.

VIII. Miscellaneous Provisions

- A. Continuing Obligation of Dealers: Unless otherwise provided by the Commissioner upon termination of any or all of the provisions of this Order, such termination shall not:
 - (1) Affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provisions of this order;
 - (2) Release or waive a violation of this Order occurring prior to the effective date of termination;
 - (3) Affect or impair any right or remedy of the Commissioner or of any other person with respect to any such violations.

- B. No dealer, including stores, shall unconscionably increase the price charged for Class I milk. The Commissioner shall continue to monitor the pricing structure of milk sold for Class I consumption within the state to determine if they are unconscionably excessive in response to this Order. Upon a determination by the Commissioner that any price is unconscionable, the Commissioner shall provide the dealer with an opportunity for a hearing in accordance with M.G.L. c. 94A section 6, and take appropriate action in accordance with said section.
- C. Continuing Power and Duty: If, upon termination of this Order, or any part thereof, there are any obligations arising hereunder, the final accrual or ascertainment of which require further acts by any dealer or by the Commissioner, the power and duty to perform such further acts shall continue.
- D. Liquidation: Upon the termination or suspension of this Order, the Commissioner shall dispose of all funds received pursuant to the provisions of this Order, in an equitable manner, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

IX. Effective Dates

This Order is implemented pursuant to the emergency provisions of M.G.L. c. 94A and M.G.L. c. 30A section 2 and is effective immediately. The first Monthly Reporting Schedule shall be due by May 25th, 1992 for the reporting month of April 1992.

A50

The provisions of this section shall cease to be in effect in the event that price setting is established pursuant to an interstate dairy compact, approved by Congress.

Signed this
26th day of
February, 1992

GREGORY C. WATSON
COMMISSIONER

This Order amends the Pricing Order dated February 18, 1992, for technical, clarification purposes.

A51

APPENDIX D.

**FINDINGS AND DECLARATION OF STATE OF
EMERGENCY IN THE MASSACHUSETTS
DAIRY INDUSTRY**

**MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE**

Dated: January 28, 1992

REPORT SUBSEQUENT TO PUBLIC HEARING

I. Petition to Hold Public Hearings

On November 13, 1991 a petition was delivered to the Department of Food and Agriculture, requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts and declare that a state of emergency exists. The petition was filed pursuant to M.G.L. c. 94A section 12.

The petition and signatures were reviewed and it was confirmed that at least twenty five percent of the licensed producers of milk within the petitioning market areas signed the petition under the pains and penalty of perjury. In fact, approximately fifty percent of the state's dairy farmers signed the petition.

In response to the petition, the Commissioner held two public hearings this week. Based upon the information already available to the Department and the Report of the Special Commission dated May 1991, the situation warranted that the Commissioner also hold hearings pursuant to sections 10 and 11 of the statute, and ascertain what prices, terms and conditions relative to milk would be most beneficial to the public interest and would best protect the milk industry. Therefore, complete investigatory hearings were held in relation to the entire milk industry.

II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on January 15, 1992; and One Ashburton Place on January 14, 1992 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

Published in:

- *Daily Hampshire Gazette* on December 21, 1991.
- *Boston Herald* on December 21, 1991.

Filed with:

- Executive Office of Communities and Development
- Massachusetts Municipal Association
- Secretary of State, Regulations Division

Sent by first class mail or facsimile to:

- All licensed milk dealers
- Agri-Mark and Mass. Milk Producers Cooperatives
- Massachusetts Farm Bureau
- *Country Folks*

Approximately 260 people attended the public hearings: 83 people presented oral testimony; 86 submitted written testimony. Additionally, some 10,000 consumers from across the Commonwealth signed a petition calling for equitable returns for dairy farmers.

III. Introduction

In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein.

Since that time, little has changed to improve the situation confronting these farmers. In fact, the situation has only become more desperate. As during the previous hearings, no testimony was received indicating that a crisis does not exist. Evidence was presented from various sectors of the public, not only dairy farmers. Testimony was received from consumers, agricultural industries, economic and financial experts, environmental groups, milk dealers, sportsmen's associations, educators, other agricultural commodity groups, as well as state legislators from both political parties.

IV. Investigation

Updates on Prices:

In 1990, the average federal blend price paid to Massachusetts dairy farmers (prior to deductions for trucking, cooperative dues, advertising allotments, stop charges, etc.) was \$14.67 per hundredweight (cwt), approximately 11.6 gallons. In 1991, the average blend price was only \$12.64. Given that the Special Commission's report estimated the average cost of production at \$15.50, and the current testimony supports this fact, our dairy farmers lost an average of \$2.86/cwt last year.

One of the farmers testified that his production of 240,000 lbs of milk per month translates to a loss of approximately \$6,864 each month. It is not surprising that our dairy farmers,

who not long ago were debt free, are no longer able to pay for feed for the cows, have been forced to mortgage homes which have been in their families for generations, are working twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families.

A prime example of the financial crisis facing Massachusetts dairy farmers is illustrated by the fact that one of the state's largest dairy producers, whose family farmed for three generations, were forced to auction their herd this past summer. They reported that during the past year alone, milk income was down twenty seven percent, representing a loss of \$134,540 in milk income. For both 1990 and 1991, even with a twenty three percent reduction in expenses, their expenses exceed their income resulting in net losses for the farm. Without a savings account, they would not have been able to survive and, not seeing an end to their losses, they chose to make the choice to sell.

The testimony is fraught with accounts of losses and pleas for immediate redress. As during the Special Commission hearings, the testimony stresses that the price farmers are paid for their product is approximately the same as in 1978. At the same time, the uncontrollable costs of production have continued to rise. The costs of health insurance, car insurance, home insurance, equipment, heating, electricity, education, worker's compensation, taxes, feed and food to name only a few expenses, have increased considerably since 1978.

"An Economic Analysis and Forecast of Massachusetts Dairy Farmer Exits," prepared by Professor Lass of the University of Massachusetts, predicts that without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

During the summer of 1991, an "Over Order" premium was established by the Commissioner. This Order, provided the dairy farmers with an average of \$.74/cwt over the blend price. Unfortunately, this pricing could not be maintained since New York was forced to discontinue its own over-order pricing. Since New York is by far the largest milk producer in the region, this action led to the collapse of the Massachusetts Over-Order. This type of stabilization remains necessary in order to ensure a continued production of a supply of fresh milk.

If no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances. In fact, Wisconsin farmers have petitioned the USDA to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping.

Update on other states' actions:

Since last year, the entire dairy industry has indicated that it is facing a disaster. New England states are pursuing every avenue possible to prevent the demise of their dairy farmers. Maine passed legislation placing a tax on milk, giving a portion to the farmers, a portion to the WIC program and a portion to fund the farmland preservation program. Vermont has eagerly been awaiting developments in other states, such as a regional interstate compact, while New York farmers may petition for another Over Order.

As each state is unique, Massachusetts needs to find a solution suitable to its dairy industry, recognizing that we are currently the largest fluid milk consuming state in the Northeast. While we continue to pursue a regional solution, the current situation cries for immediate action. Although we

acknowledge the milk dealers' desire for a regional pricing structure, we must ensure the survival of our indigenous dairy production while this avenue is aggressively pursued.

V. Conclusion

In order to alleviate the situation facing the our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England. This system must also address the regional character of the flow of milk and the need to provide consumers with a high quality product at a reasonable price.

An "Over Order" assures the Massachusetts dairy farmer a price "over" the federally established price, based upon the unique circumstances facing each state. The Department should prepare regulations, in the nature of an Over Order, which would create a mechanism ensuring the Massachusetts dairy farm an amount "over" the federally regulated blend price for milk. The Department should provide the mechanism for payment, and all funds should be collected only on behalf of Massachusetts producers. Any excess should be returned directly to dealers, with no amount taken out for administration of the program.

In addition, every effort should be made to pursue a regional compact. Although this solution is a long term goal, requiring adoption of an identical compact in at least four states and congressional approval, Massachusetts, as a large consuming state, will play a pivotal role in the potential future of any such compact.

COMMISSIONER'S DECLARATION OF EMERGENCY

As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency

of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. I reach this conclusion after a series of investigatory hearings and reviewing testimony from farmers, consumers, and experts from various facets of this complex industry.

These findings confirm the conclusions reached last May by the Special Commission on Dairying. Today, however, the crisis is more serious and the need to act more pressing. Regionally, the industry is in serious trouble and ultimately, a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem.

Signed this 28th day of January 1992.

GREGORY C. WATSON
COMMISSIONER

No. 75-141

FILED
AUG 27 1973

In the Supreme Court of the CLERK
United States

October Term, 1973

WESTLYN CHEASERY, INC. and
LECONTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT HARRINGTON
ATTORNEY GENERAL
OF MASSACHUSETTS

By A. J. [illegible]

Assistant Attorney General

[illegible]

One [illegible] [illegible] 2010

[illegible]

(617) 725-1000 ext. 217

QUESTION PRESENTED

Does a Massachusetts pricing order requiring all Massachusetts milk dealers to make premium payments based upon the amount of milk they sell in Massachusetts and providing for distribution of amounts to Massachusetts dairy farmers violate the interstate Commerce Clause?

PARTIES TO THE PROCEEDINGS

The petitioners in these proceedings are listed in the petition for certiorari at ii. The respondent is Jonathan Healy, the present Commissioner of the Massachusetts Department of Food and Agriculture, who is substituted for Gregory Watson, the former Commissioner of the Massachusetts Department of Food and Agriculture, pursuant to Supreme Court Rule 35.3.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	2
JURISDICTION	3
RELEVANT CONSTITUTIONAL AND REGULATORY PROVISIONS	3
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	13
I. THE COMMERCE CLAUSE ISSUE PRESENTED IS NOT OF SUCH GRAVITY AND GENERAL IMPORTANCE AS TO REQUIRE REVIEW BY THIS COURT.	14
II. THE SUPREME JUDICIAL COURT'S DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.	16
A. The Pricing Order Does Not Discriminate Against Interstate Commerce.	17
B. The Pricing Order Does Not Unduly Burden Interstate Commerce.	27
III. ANY CONFLICT BETWEEN THE DECISION BELOW AND THE TWO UNAPPEALED DISTRICT COURT OPINIONS CITED BY PETITIONERS IS NOT REAL AND EMBARRASSING.	29
CONCLUSION	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Kenneth Adams, et al. v. Gregory Watson as Commissioner, Massachusetts Department of Food and Agriculture, No. 93-1068, U.S. App. LEXIS 20569 (1st Cir. August 13, 1993)</u>	20
<u>Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)</u>	24
<u>Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)</u>	16, 18 19, 21
<u>Baxley v. Alabama Dairy Comm., 360 F. Supp. 1159 (M.D. Ala 1973)</u>	23
<u>Farmland Dairies v. McGuire, 789 F. Supp. 1243 (S.D.N.Y. 1992)</u>	30, 31
<u>Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937)</u>	23
<u>In re Woods, 143 U.S. 202 (1892)</u>	13
<u>Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)</u>	30

<u>Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)</u>	25
<u>Marigold Foods, Inc. v. Redalin, 809 F. Supp. 714 (D. Minn. 1992)</u>	31, 31
<u>Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)</u>	24
<u>Milk Control Bd. v. Eisenberg Farm Products Co., 306 U.S. 346 (1939)</u>	19, 22-23
<u>Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)</u>	28
<u>New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988)</u>	26
<u>Parker v. Brown, 317 U.S. 341 (1943)</u>	25
<u>Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)</u>	16, 27, 28
<u>Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964)</u>	21, 22

	<u>Page</u>
<u>Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70 (1955)</u>	30
<u>Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm., 365 F. Supp. 1144 (M.D. La. 1973), aff'd, 416 U.S. 922 (1974)</u>	23
<u>United Dairy Farmers Cooperative Assn. v. Milk Control Comm., 335 F. Supp. 1008 (M.D. Pa.) aff'd, 404 U.S. 930 (1971)</u>	23-24
<u>Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)</u>	26

Constitutional Provisions

U.S. Const. Art. 1, § 8, cl. 3	4
--------------------------------	---

Statutes

7 U.S.C. §§ 601 et seq.	6, 15
28 U.S.C. § 1257(a)	3
Mass. G.L. c. 29, § 2V	7
Mass. G.L. c 94A, §§ 1 et seq.	6
Mass. St. 1992, c. 23 § 7	7

Rules and Regulations

	<u>Page</u>
Supreme Court Rule 10.1	13
Supreme Court Rule 10.1(b)	30
Supreme Court Rule 15	1
Supreme Court Rule 35.3	ii
7 C.F.R. § 1001	6

No. 93-141

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

WEST LYNN CREAMERY, INC. and
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15,
the respondent Jonathan Healy,
Commissioner of the Massachusetts
Department of Food and Agriculture

("Commissioner"), submits this brief in opposition to the petition for writ of certiorari ("Pet."). As used in this brief, the term "Commissioner" refers to the present Commissioner or, with respect to actions on or before June 11, 1993, his predecessor in office.

DECISIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages A1-A13 of the appendix to the petition ("Pet. App."), is reported at 415 Mass. 8, 611 N.E.2d 239 (1993). The decisions of the Single Justice of the Massachusetts Appeals Court (Pet. App. A17-A21) and the Massachusetts Superior Court (Pet. App. A22-A26) concerning stay of the Commissioner's decisions are

not reported. The decisions of the Commissioner (Pet. App. A27-A40) are not reported.

JURISDICTION

The opinion of the Supreme Judicial Court was entered April 15, 1993. See Pet. App. A1. The petition was filed July 14, 1993, and was received by the Commissioner that day. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND REGULATORY PROVISIONS

The pertinent portion of the Commerce Clause of the Constitution of the United States provides that "The Congress shall have power . . . [t]o

regulate Commerce . . . among the
several States" U.S.
Constitution, Art. 1, § 8, cl. 3.

The text of the pricing order issued
by the Commissioner is accurately set
forth in the appendix to the petition.
Pet. App. A41-A50.

STATEMENT OF THE CASE

An accurate statement of the case
appears at pages A2-A8 (opinion of the
Massachusetts Supreme Judicial Court) of
the appendix to the petition.^{1/}
However, the decisions below do not
succinctly set forth the terms of the
pricing order, and the petitioners seek
to characterize the pricing order and
its purpose without fairly describing
the order. As to that subject, the
Commissioner also states as follows.

^{1/} Subsequent to that decision, the
Supreme Judicial Court allowed the
petitioners' motions seeking to stay
issuance of that Court's rescript
pending this Court's disposition of the
petition and subsequent proceedings, if
any. Pet. App. A15.

The Commissioner issued the pricing order on February 26, 1992, pursuant to the Massachusetts Milk Control Law, Mass. G.L. c. 94A, § 1 et seq. See Pet. App. A3 (opinion of the Supreme Judicial Court). The pricing order established a target price to be paid to Massachusetts producers above the minimum price established by the United States Secretary of Agriculture under the New England Milk Marketing Order No. 1, 7 C.F.R. § 1001, and the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601 et seq.

Under the Massachusetts pricing order, all milk dealers doing business in Massachusetts are required to make premium payments to the Massachusetts Dairy Equalization Fund ("fund")

established under the order. Pet. App. A44.^{2/} The premium payments are based on dealers' initial sales of Class I milk in Massachusetts multiplied by one-third of the difference between the Massachusetts target price and the federal Order No. 1 minimum blend price for a specific zone. Pet. App. A44. The milk dealers must report their sales and submit their premium payments for a given month to the Massachusetts Department of Food and Agriculture on a monthly reporting schedule due on or

^{2/} The Legislature subsequently enacted legislation establishing the fund on the books of the Commonwealth. See Mass. St. 1992, c. 23, § 7 (inserting Mass. G.L. c. 29, § 2V).

before the 25th day of the following month, commencing with May 25, 1992 for the April 1992 reporting period. Pet. App. A43-A44.

By the fifth day of each month, the Commissioner is to make distributions from the fund to licensed Massachusetts producers (dairy farmers) according to a formula based upon each producer's proportion of milk produced in Massachusetts for the preceding month. Pet. App. A45-A46. The distributions are limited by caps on the dollars received per hundredweight (\$15/cwt) and the amount of milk per farmer subject to the distributions (200,000 lbs/month). Pet. App. A46. Any balance remaining in the fund after distributions to the dairy farmers is to be returned to the

milk dealers in proportion to their contributions for the month. Pet. App. A47.

A milk dealer's premium payment is thus fixed by the target price, the federal minimum price, and the amount the dealer sells in Massachusetts. It is separate from the amounts paid by milk dealers to dairy farmers under the federal orders described by petitioners. Pet. 4-5.^{3/} The petitioners thus wrongly characterize

^{3/} In the court below, petitioners expressly conceded that "[f]or the purposes of this case, it is unnecessary to explore the differences between the Zone 21 [federal order] price and the market price." Brief for Plaintiffs-Appellants at 6 n.4.

the pricing order when they state that "milk dealers must pay the minimum Massachusetts price for all milk, even milk purchased out of state." Pet. 15. Milk dealers pay the federally established price, not the Massachusetts target price, for milk purchased from out-of-state producers.

Petitioners similarly confuse matters in footnote 3 of the petition by defining "Premium" as the difference between the Order No. 1 minimum price and the pricing order target price. Pet. 6 n.3. See also Pet. 7. The pricing order defines the dealers' "premium payments" as a sum of money calculated by multiplying Massachusetts sales by one third of the difference

between the federal minimum price and the Massachusetts target price.

While the pricing order was designed to benefit Massachusetts farmers, its purpose was not "economic protectionism and discrimination against competition in the Massachusetts milk market" as claimed in the petition. Pet. 17. In his Findings and Declaration of Emergency, the Commissioner expressed his concern for the dairy farmers in the Northeast and noted the need to assist farmers and maintain local supplies of fresh milk for consumers. See Pet. App. A55, A56. However, in the absence of a regional solution, the Commissioner issued the pricing order regulating local activities to "provide an immediate interim solution to the state

of emergency facing the Massachusetts dairy industry." Pet. App. A41.

"Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk." Id.

As noted in the Commissioner's Findings, an analysis by Professor Lass of the University of Massachusetts presented at the hearings predicted that "without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture." Pet. App. A54.

REASONS FOR DENYING THE WRIT

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10.1. Such a writ is to be granted "only when there are special and important reasons therefor." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892).

For the reasons set forth below, the petition does not satisfy the

traditional criteria which guide the Court's discretionary review.

Accordingly, the petition should be denied.

I. **THE COMMERCE CLAUSE ISSUE
PRESENTED IS NOT OF SUCH
GRAVITY AND GENERAL IMPORTANCE
AS TO REQUIRE REVIEW BY THIS
COURT.**

While petitioners present this case as an opportunity for the Court to provide abstract guidance concerning the "constitutional parameters" of States' powers to regulate the milk industry, Pet. 12, the question of Commerce Clause limitations on the States' power has been explored in the numerous cases cited by the petitioners themselves.

Pet. 10.^{4/} The Supreme Judicial Court only applied this Court's precedents and sustained the pricing order. The petitioners do not provide any reason to think that the legal issues presented by the petition are of importance to the nation other than to assert that the opinion of the Supreme Judicial Court conflicts with decisions of this Court, a point addressed in Part II, infra.

^{4/} Petitioners do not relate their lengthy discussion of federal regulation of the milk industry, Pet.4-6, to any issue presented for review. For example, they do not claim that the pricing order in any way conflicts with regulation by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 et seq., including the ability of the Secretary to set minimum prices for milk.

II. THE SUPREME JUDICIAL COURT'S
DECISION IS CONSISTENT WITH
PRIOR DECISIONS OF THIS COURT.

The petitioners assert that the Supreme Judicial Court misapplied this Court's dormant Commerce Clause precedents in upholding the pricing order. They claim that (1) the Court below erroneously held that the order did not discriminate in purpose or effect against interstate commerce in light of Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and (2) the Court below was required to and failed to consider less restrictive alternatives under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). However, the Supreme Judicial Court correctly held that "the pricing order does not discriminate on its face, in evenhanded in its

application, and only incidentally burdens interstate commerce." Pet. App. A9.

A. The Pricing Order Does
Not Discriminate Against
Interstate Commerce.

The Supreme Judicial Court's conclusion that the pricing order does not discriminate against interstate commerce rests precisely on the manner in which the order requires milk dealers to make fund contributions. Pet. App. A9. As noted by the Court, the order applies evenhandedly to all dealers handling milk for sale in Massachusetts. Id. All milk dealers, regardless of their state of incorporation or principal place of business, must make premium payments with respect to the milk they sell in

Massachusetts, regardless of the source of the milk.

Most importantly for the instant petition, the Supreme Judicial Court pointed out that "[t]he pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin." Pet. App. A10. The dealers' premium is independent of the price the milk dealer has paid for the milk. Pet. App. A10.

The order thus differs from the regulation struck down in Baldwin because it does not regulate the amount the dealer pays to out-of-state dairy farmers. The statute in Baldwin was condemned because its prohibition on the sale of milk purchased for less than the New York state minimum price erected a

barrier to traffic between the states.

294 U.S. at 521. The pricing order here, however, does not "attempt[] to affect and regulate the price to be paid for milk in a sister state"

Milk Control Bd. v. Eisenberg Farm Products Co., 306 U.S. 346, 353 (1939) (distinguishing Baldwin).

Assuming, without deciding, that the dealers had standing to assert the interests of out-of-state producers, Pet. App. A10, A11, the Supreme Judicial Court noted that the order provides the dealers with no incentive to purchase milk in Massachusetts instead of out-of-state. Pet. App. A10. Indeed, the United States Court of Appeals for the First Circuit has stated that the same Massachusetts pricing order creates

the opposite incentive. Kenneth Adams, et al. v. Gregory Watson as Commissioner, Massachusetts Department of Food and Agriculture, No. 93-1068, slip op. at 10, 1993 U.S. App. LEXIS 20569, *11 (1st Cir. August 13, 1993) (Massachusetts pricing order "virtually ensures dealers an incentive to purchase out-of-state milk") (affirming dismissal of out-of-state farmers' challenge to Massachusetts pricing order for lack of standing).^{5/} The pricing order says nothing about out-of-state milk and does not attempt to require dealers to pay

^{5/} The appellant out-of-state producers in the Adams case have received an extension of time in which to petition for rehearing to September 15, 1993.

any amount to out-of-state farmers. It only requires payment of a non-discriminatory premium on all milk sold in the Commonwealth.

Petitioners' assertion that this Court "considered and rejected" this evenhandedness argument in Baldwin, Pet. 18, is wrong. Baldwin dealt with a statute of extraterritorial effect that required payment of a specific price to out-of-state farmers on pain of barring the sale of that milk in New York. 294 U.S. at 521. The pricing order here is concerned only with in-state sales and production. The order does not prevent the milk dealers from acquiring and selling in Massachusetts milk from any source they may choose. Cf. Polar Ice Cream & Creamery Co. v. Andrews, 375

U.S. 361, 378 (1964) (regulations requiring dealer to purchase milk from in-state producers). Nor does it "remove[] any economic incentive for a local distributor to purchase out-of-state milk" Polar, 375 U.S. at 376. The pricing order does not pose a barrier, but is neutral with respect to the importation of out-of-state milk.

The order is based on the amount of milk sold by each dealer in Massachusetts and sets only the target price received by Massachusetts producers. It accordingly falls within the long line of cases upholding state regulation of the pricing of milk produced in a state, see Milk Control Bd. v. Eisenberg Farm Products Co., 306

U.S. 346, 353 (1939); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 615 (1937), and of the sale of milk within a state, see Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm., 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three judge court) ("there is no constitutional infirmity in a state regulation requiring that purely in-state transactions be governed by the Commission's pricing schedules . . . even though the product sold within the state and whose selling price is there regulated, originates outside of the state"), aff'd, 416 U.S. 922 (1974); Baxley v. Alabama Dairy Comm., 360 F. Supp. 1159, 1164 (M.D. Ala 1973) (three judge court); United Dairy Farmers Cooperative Assn. v. Milk Control Comm.,

335 F. Supp. 1008, 1014 (M.D. Pa.)
(three judge court), aff'd, 404 U.S. 930
(1971).

With respect to the purpose of the pricing order, the Supreme Judicial Court correctly noted that the "fund distributions represent an infusion of capital designed solely to save an industry from collapse." Pet. App. All. Such a purpose is legitimate. The States' power to promote the vitality of economic activity within the State is well established. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 877 n.6 (1985) ("promotion of local industry is a legitimate state interest in the Commerce Clause context"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) ("a State may enact laws pursuant

to its police powers that have the purpose and effect of encouraging domestic industry."); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980) ("In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."); Parker v. Brown, 317 U.S. 341, 367 (1943) ("the adoption of legislative measures to prevent the demoralization of industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent congressional action, is a problem whose solution is particularly

within the province of the state.").

Indeed, a state may subsidize domestic industry. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988). The distributions under the Massachusetts pricing order concern only the regulation of in-state transactions, and the purpose of benefitting Massachusetts dairy farmers without burdening out-of-state farmers does not violate the Commerce Clause. See Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992) (The "'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (quoting Limbach, 486 U.S. at 273-74) (emphasis added).

B. The Pricing Order Does Not Unduly Burden Interstate Commerce.

Respondents contend that the Supreme Judicial Court erred in applying the balancing approach of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), because the Court did not "consider the availability of any less restrictive alternatives to the pricing order." Pet. 20. However, they ignore both the nature of the "incidental burden" noted by the Supreme Judicial Court, Pet. App. A11, and the analysis called for under Pike.

The Supreme Judicial Court noted only that the fund distribution scheme "burdens" out-of-state producers "to the extent these producers are not entitled to receive fund distributions"

Pet. App. A11.^{6/} The pertinent aspect of Pike only asks whether the local interest involved "could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). The prevention of the collapse of a state industry could not be achieved by any way other than providing monies,

^{6/} The Supreme Judicial Court correctly did not consider the collection of premium payments from the milk dealers to be a burden on interstate activities. See Pet. App. A13. The order requires premium payments based on all milk sold in the state by milk dealers. In so doing, the Order regulates only the essentially local activities of milk sales within Massachusetts. See cases cited at page 23, supra.

directly or indirectly, which would have the same "impact" on interstate activities, i.e., the absence of distributions to out-of-state producers, as the pricing order. None of petitioners' suggested alternatives - subsidies from tax revenues, tax relief, or even raising the price paid by dealers to Massachusetts farmers - lack this "impact."

III. ANY CONFLICT BETWEEN THE
DECISION BELOW AND THE TWO
UNAPPEALED DISTRICT COURT
OPINIONS CITED BY PETITIONERS
IS NOT REAL AND EMBARRASSING.

Petitioners do not claim that the the Supreme Judicial Court of Massachusetts "has decided a federal question in a way that conflicts with the decision of another state court of

last resort or of a United States court of appeals." Supreme Court Rule 10.1(b). Instead, they assert that the decision is in "irreconcilable conflict" with decisions of two United States District Courts, Marigold Foods, Inc. v. Redalen, 809 F. Supp. 714 (D. Minn. 1992), and Farmland Dairies v. McGuire, 789 F. Supp. 1243 (S.D.N.Y. 1992). Pet. 13. The existence of these two district court decisions does not warrant plenary review by this Court. Even a conflict among appellate courts will not justify review unless it is "real and embarrassing." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). The conflict

asserted by the petitioners is neither real nor embarrassing.

One of the two opinions, Marigold Foods, considered Commerce Clause issues only in the context of a motion for a preliminary injunction. 809 F. Supp. at 717, 719. The other case, Farmland Dairies, is distinguishable on its facts. As noted by the Supreme Judicial Court, the New York regulation at issue in Farmland Dairies "provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses." Pet. App. A12 n.14 (citing 789 F. Supp. at 1248 & n.5). See also 789 F. Supp. at 1252. The pricing order provides no such incentive. There is thus no split of

authority that would warrant plenary review in this case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

JONATHAN HEALY, COMMISSIONER OF
THE MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE

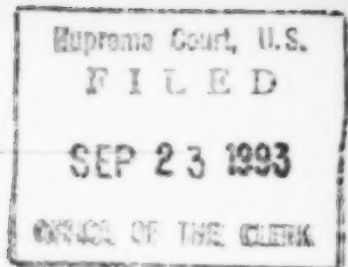
Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Eric A. Smith
Assistant Attorney General
Counsel of Record
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2075

Dated: August 27, 1993

No. 93-141



**In the
Supreme Court of the United States**

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITIONERS' REPLY BRIEF

MICHAEL L. ALTMAN,
Counsel of Record
MARGARET A. ROBBINS,
RUBIN AND RUDMAN,
50 Rowes Wharf,
Boston, Massachusetts 02110.
(617) 330-7000
Counsel for Petitioners

Table of Contents.

Table of authorities	ii
Introduction	1
Argument	2
I. The Commissioner's Reliance on <i>Eisenberg</i> in Support of the Constitutionality of the Pricing Order is Inapposite	2
II. The Interests Sought by the Pricing Order Could be Promoted with a Lesser Impact on Interstate Commerce	4
III. The First Circuit Court of Appeals Decision Interpreting the Pricing Order is Erroneous Because that Court Misunderstood the Manner in Which the Pricing Order Operates	5
Conclusion	8

Table of Authorities Cited.

CASES.

<i>Kenneth Adams et al. v. Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture</i> , No. 93-1068, slip op. 1993 U.S. App. LEXIS 20569 (1st Cir. August 13, 1993)	5, 6
<i>Baldwin v. G.A.F. Seelig</i> , 294 U.S. 511 (1935)	3
<i>Baxley v. Alabama Dairy Commission</i> , 360 F. Supp. 1159 (Md. Ala. 1973)	3n
<i>Milk Board v. Eisenberg Co.</i> , 306 U.S. 346 (1939)	2, 3
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	2, 4
<i>West Lynn Creamery, Inc., et al. v. Commissioner of Department of Food and Agriculture</i> , 415 Mass. 8 (1993)	6

No. 93-141

**In the
Supreme Court of the United States**

OCTOBER TERM, 1993

**WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,**
Petitioners,

v.

**JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,**
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITIONERS' REPLY BRIEF

INTRODUCTION

The Petitioners West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's")¹ submit this brief in reply to the Brief in Opposition to Petition for Certiorari

¹ Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

submitted by the Respondent, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner"). First, *Milk Board v. Eisenberg Co.*, 306 U.S. 346 (1939), relied upon by the Commissioner, is inapposite: *Eisenberg* involved a minimum price that was established for in-state milk; this case involves an order that impacts out-of-state milk. Second, the Commissioner could have protected Massachusetts farmers with a less restrictive burden on interstate commerce within the meaning of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Finally, a very recent First Circuit decision misconstrues the Pricing Order and contradicts the Massachusetts Supreme Judicial Court's opinion in this case.

ARGUMENT

I. THE COMMISSIONER'S RELIANCE ON *Eisenberg* IN SUPPORT OF THE CONSTITUTIONALITY OF THE PRICING ORDER IS INAPPOSITE.

Relying on *Milk Board v. Eisenberg Co.*, the Commissioner asserts that the Pricing Order is constitutional because it "does not 'attempt to regulate the price to be paid for milk in a sister state. . . .'" (Respondent's Brief in Opposition at pp.18-20 citing *Eisenberg*, 306 U.S. at 353). The statute in *Eisenberg*, however, is wholly different from the Pricing Order. In *Eisenberg*, Pennsylvania set a minimum price that dealers had to pay for milk produced in Pennsylvania. A local dealer argued that the statute burdened interstate commerce because the dealer intended to ship his milk out-of-state after purchasing it in Pennsylvania. The Supreme Court upheld the statute, despite this argument of an indirect effect on interstate commerce. *Id.* at 353.²

²The Court concluded that the Pennsylvania statute had only an incidental effect on interstate commerce. This conclusion was based in part on the fact that "only a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.*

The Commissioner's reliance on *Eisenberg* is inapposite.³ The issue in the case before this Court does not involve the Commissioner's authority to fix a minimum price for Massachusetts produced milk. The Pricing Order here effectively sets a minimum price for *all* milk, by requiring dealers to make compensatory payments into the Fund based on the amount of milk sold in Massachusetts, regardless of where the milk was originally purchased (App. A41-A50).⁴ Because these compensatory payments equalize the price of in-state and out-of-state milk, the effect is to establish a minimum price for out-of-state milk. Thus, the Pricing Order, like the statute in *Baldwin*, regulates the price paid for milk produced in other states. Moreover, the Pricing Order burdens interstate commerce even more substantially than the statute in *Baldwin* because in *Baldwin*, but not in this case, the out-of-state farmers received the differential between the market price and the New York minimum price. On the other hand, the statute in *Eisenberg* operated only intra-state and the dealer in *Eisenberg*, unlike the dealer in Massachusetts, could purchase its milk at lower prices from other states. Purchases of milk from out-of-state, of course, would cause economic harm to the local farmers involved in the *Eisenberg* case. The Commerce Clause, however, permits states to burden local industry, explaining the result in *Eisenberg*, but does not permit the states to burden industry in other states, explaining the result in *Baldwin*.

³The Commissioner's reliance on *Baxley v. Alabama Dairy Commission*, 360 F.Supp. 1159 (Md. Ala. 1973) is also inapplicable (Respondent's Brief in Opposition at p.23). The holding in that case, like *Eisenberg*, is that a state may set minimum prices for in-state milk. *Id.* at 1165. Because the Pricing Order does more than set a minimum price for Massachusetts milk, the holding in *Baxley* is not relevant.

⁴"App." refers to the material printed in the Appendices to the Petitioners' Petition for Writ of Certiorari.

II. THE INTERESTS SOUGHT BY THE PRICING ORDER COULD BE PROMOTED WITH A LESSER IMPACT ON INTERSTATE COMMERCE.

The Commissioner argues that the interests promoted by the Pricing Order could not be achieved with a lesser impact on interstate commerce, and therefore, the Massachusetts Supreme Judicial Court correctly applied the *Pike* balancing approach in holding the Pricing Order constitutional (Respondent's Brief in Opposition at pp.27-29 citing *Pike v. Bruce Church, Inc.*, 397 U.S. at 137). The Commissioner argues that the "prevention of the collapse of a state industry could not be achieved by any way other than providing monies, directly or indirectly" to in-state farmers (Respondent's Brief in Opposition at pp.28-29). The Pricing Order, however, does more than simply provide a subsidy to Massachusetts farmers. The monies distributed to the Massachusetts farmers *are derived directly from the sale of out-of-state milk*. Since the majority of milk sold in Massachusetts is purchased out-of-state, the assessment on out-of-state milk is being used to subsidize local dairy farmers. Contrary to the Commissioner's assertions, alternative methods of relief — subsidies from the Massachusetts General Fund or tax relief in the form of reduced property or income tax payments — would be less burdensome on interstate commerce than the Pricing Order. First of all, these alternative methods of relief would not directly burden interstate transactions. Second, the Massachusetts Court did not explore the effect of these less restrictive alternatives as required by *Pike*. For these reasons, the Massachusetts court committed error when it concluded that the Pricing Order satisfied the requirements of *Pike*.

III. THE FIRST CIRCUIT COURT OF APPEALS DECISION INTERPRETING THE PRICING ORDER IS ERRONEOUS BECAUSE THAT COURT MISUNDERSTOOD THE MANNER IN WHICH THE PRICING ORDER OPERATES.

In his Opposition, the Commissioner understandably mentions a recent First Circuit Court of Appeals decision which dismissed the plaintiffs' complaint on the grounds that out-of-state farmers did not sufficiently allege standing to challenge the Pricing Order (Respondent's Brief in Opposition at p.20 citing *Kenneth Adams, et al. v. Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture*, No. 93-1068, slip op. 1993 U.S. App. LEXIS 20569 (1st Cir. August 13, 1993)).

Adams involved the same Pricing Order that is at issue in this case. There, the plaintiff out-of-state farmers argued that they were competitively harmed by the Pricing Order because it removed an economic incentive to purchase out-of-state milk — an incentive that would otherwise exist but for the structure of the Pricing Order. The First Circuit concluded that it could reject these specific allegations of injury-in-fact because the Pricing Order "virtually ensures dealers an incentive to purchase out-of-state milk." *Id.* at 12. Therefore, according to the court, the Pricing Order, a regulation designed by the Commissioner to protect Massachusetts farmers, actually helps out-of-state farmers and hurts Massachusetts farmers. *Id.* The court's conclusion was based on a complete misunderstanding of the manner in which the Pricing Order operates. The plaintiff out-of-state farmers have, therefore, petitioned that court for a rehearing and the petition is pending as of this date.

The First Circuit's startling conclusion is contrary to the opinion of the Massachusetts Supreme Judicial Court sought to be reviewed in this Petition. The Massachusetts court noted that the Pricing Order was designed to "boost the amount of money local dairy farmers — the producers — receive for milk

... " *West Lynn Creamery, Inc., et al. v. Commissioner of Department of Food and Agriculture*, 415 Mass. 8, 11 (1993) (App. A4). The Massachusetts court specifically recognized that the Pricing Order has an "adverse impact on interstate commerce." *Id.* at 17 (App. A11). In fact, the Massachusetts court held that the "Pricing Order does burden interstate commerce," but that this burden was only "incidental." *Id.* (App. A13).

The two decisions are at odds because the First Circuit based its decision on an erroneous interpretation of the manner in which the Pricing Order operates. The Court mistakenly believed that payments are made to Massachusetts farmers under the Pricing Order in proportion to their *sales* to Class I milk dealers. *Adams*, No. 93-1068, slip op. 1993 U.S. App. Lexis 20569, at 3.⁵ In fact, the Pricing Order *by its express terms* provides that payments are to be made from the Fund to the Massachusetts producers based on "their proportion of milk *produced* in Massachusetts" (App. A45) (emphasis added).

Relying on the erroneous conclusion that producers receive monies from the Fund based on their *sales* to Class I milk dealers, rather than their *production* of milk, the Court believed that the dealers could control how much money the farmers received from the Fund by buying less milk from Massachusetts farmers. *Adams*, No. 93-1068, slip op. 1993 U.S. App. Lexis 20569, at 12. The Court also believed that since monies are distributed to farmers based on the amount of milk they sold to dealers, the dealers could decrease the amount of money distributed to farmers by buying less milk from Massachusetts farmers. *Id.* Therefore, the court concluded that there is "an inadvertent (but certainly significant) incentive under the pricing order for Massachusetts dealers to purchase as much milk as possible from out-of-state producers." *Id.*

In its decision, the Massachusetts court correctly noted that the "Commissioner distributes the fund to producers in proportion to the milk *produced* in Massachusetts" and not in proportion to milk sold by producers to Class I milk dealers. *West Lynn Creamery*, 415 Mass. at 12 (App. A5) (emphasis added).

This is simply not how the Pricing Order operates. Under the Pricing Order, assessment payments are collected from the dealers based on the amount of Class I milk they sell in Massachusetts each month⁶ (App. A44-A45). If, for example, a dealer were to purchase 10,000 cwt of milk from in-state farmers and were to sell it all as Class I milk in Massachusetts (assuming a blend price of \$12.00/cwt), the dealer's assessment payment would be \$10,000.00.⁷ If, on the other hand, the dealer purchased all of his milk from out-of-state farmers, the dealer's payment would be exactly the same because the assessment is based on the amount of Class I milk a dealer sells in Massachusetts, not the amount of milk purchased from Massachusetts farmers (App. A44-A45).

After monies are deposited into the Fund, Massachusetts farmers receive payments based upon their proportion of milk produced in Massachusetts (App. A45-A47). Thus, if Farmer A produced 10,000 cwt of milk and the total amount produced by Massachusetts farmers was 100,000 cwt of the milk, Farmer A would have produced 10% of milk produced in Massachusetts. He would therefore be entitled to 10% of the total amount in the Fund. Assuming that there is \$1,000,000.00 in the Fund, Farmer A would receive \$100,000.00.⁸

Distributions to the farmers from the Fund have nothing to do with how much milk the farmer actually *sells* to milk dealers for Class I use (App. A45-A47). Regardless of where and for what purpose the Massachusetts farmer sells his milk, he still

⁵ The Pricing Order assessment is equal to one-third the difference between the federal blend price and \$15.00/cwt (App. A45).

Assuming a blend price of \$12.00, the assessment would be calculated as follows: $\frac{1}{3} (\$15.00 - \$12.00) = \$1.00 \times 10,000.00 \text{ cwt (the amount of Class I milk the dealers sold in Massachusetts)} = \$10,000.00$.

⁸ There is a cap on the amount of money a farmer can receive from the Fund: \$15.00 minus the blend price multiplied by the "amount, in pounds, produced by the producer" (App. A46). This cap appears to be designed to ensure that the Massachusetts farmers do not receive more than \$15.00/cwt for the milk that they produce.

receives money based on the amount of Class I milk sold by the dealers in Massachusetts (App. A44-A47). Thus, if Farmer A were to sell all of his milk to a powdered milk facility in New Hampshire for Class III use, instead of to a Class I milk dealer, Farmer A would still receive \$100,000.00 from the Fund. *The formula is based on milk production, rather than Class I milk sales.* Since the dealers cannot control the amount of money distributed to the Massachusetts farmers by purchasing more milk from out-of-state farmers, there is no "inadvertent incentive" created by the Pricing Order to purchase out-of-state milk. The First Circuit's conclusions to the contrary are simply wrong. The Pricing Order in fact harms out-of-state farmers by removing the dealers' incentive to purchase what would otherwise be lower priced out-of-state milk. Therefore, the First Circuit's decision which impliedly states that the Pricing Order does not burden interstate commerce is wrong, and no such inference should be drawn from that decision.

CONCLUSION

Wherefore, the Petitioners West Lynn Creamery, Inc. and LeComte's Dairy, Inc. respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

MICHAEL L. ALTMAN,

Counsel of Record

MARGARET A. ROBBINS,

RUBIN AND RUDMAN,

50 Rowes Wharf,

Boston, Massachusetts 02110,

(617) 330-7000

Counsel for Petitioners

September 23, 1993

AUG 26 1993

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY
FARMERS, GORDON M. COOK, DAVID W. DUPREY,
WARREN E. FACEY, DONALD LEAB,
MASSACHUSETTS FARM BUREAU FEDERATION, INC.
AND MASSACHUSETTS COOPERATIVE MILK
PRODUCERS, INC. AS AMICI CURIAE
IN OPPOSITION TO THE PETITION

ERWIN N. GRISWOLD
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

ALLEN TUPPER BROWN
58 River Road
Gill, Massachusetts 01376
(413) 863-3100

Counsel for Amici Curiae

34128

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE MILK PRICING ORDER NEITHER DISCRIMINATES AGAINST OUT-OF-STATE PRODUCERS NOR RESTRICTS INTERSTATE COMMERCE	3
II. THERE IS A CLEAR FACTUAL BASIS FOR THE COMMISSIONER'S FINDING OF AN EMERGENCY IN THE MASSACHUSETTS DAIRY INDUSTRY, THE CONDITION OF WHICH HAS FURTHER DETERIORATED OVER THE PAST EIGHTEEN MONTHS	5
III. UNDER THE PRECEDENTS OF THIS COURT, THE MILK PRICING ORDER IS A CONSTITUTIONAL EXERCISE OF A STATE'S POWER TO PROMOTE THE WELFARE OF ITS CITIZENS AND INDUSTRY ..	7
IV. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS	12
CONCLUSION	13
APPENDIX: Opinion of the United States Court of Appeals for the First Circuit in <i>Adams v. Watson</i> , decided August 13, 1993	A1

TABLE OF AUTHORITIES

Cases	Page
<i>Adams v. Watson</i> , No. 93-1068 (1st Cir. decided Aug. 13, 1993)	4, 5, 7
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	9
<i>Baldwin v. G.A.F. Seelig Inc.</i> , 294 U.S. 511 (1935)	9, 10, 12
<i>Cumberland Farms, Inc. v. LaFaver</i> , Civ. No. 92-70-P-H (D. Me. decided Aug. 3, 1993)	11
<i>Farmland Dairies v. McGuire</i> , 789 F. Supp. 1243 (S.D.N.Y. 1992)	12, 13
<i>Marigold Foods v. Redalin</i> , 809 F. Supp. 714 (D. Minn. 1992)	12
<i>Milk Control Board v. Eisenberg Farm Products</i> , 306 U.S. 346 (1939)	10, 12
<i>New Energy Co. v. Limbach</i> , 486 U.S. 269 (1988)	9
<i>Opinion of the Justices</i> , 601 A.2d 610 (Me. 1991)	10
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	8
<i>United States v. Butler</i> , 297 U.S. 1 (1936).	10
Constitutional Provisions	
U.S. Const. Art. I, § 8, cl. 3	8
Other Authorities	
<i>The Recorder</i> (Greenfield, Mass.), August 3, 1993	6, 7

IN THE Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-141

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

**BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY
FARMERS, GORDON M. COOK, DAVID W. DUPREY,
WARREN E. FACEY, DONALD LEAB,
MASSACHUSETTS FARM BUREAU FEDERATION, INC.
AND MASSACHUSETTS COOPERATIVE MILK
PRODUCERS, INC. AS AMICI CURIAE IN OPPOSITION
TO THE PETITION**

INTEREST OF THE AMICI

The Massachusetts Association of Dairy Framers (the "Association") is an unincorporated association of milk producers in Massachusetts. Messrs. Cook, Duprey, Facey and Leab are members of the Association and are owners and operators of dairy farms within the Commonwealth. Massachusetts Farm Bureau Federation, Inc. (the "Federation") is an incorporated, non-profit organization consisting of members of all segments of the Massachusetts agricultural industry, including approximately

eighty-six percent of the dairy farms in Massachusetts. Massachusetts Cooperative Milk Producers, Inc. (the "Co-op"), a non-profit corporation in Massachusetts, is a marketing cooperative of approximately seventy dairy farmers. The Association, the four individuals and the dairy farming members of the Federation and the Co-op are hereafter referred to as the "Producers."

The Producers' farms are part of the dairy industry with respect to which the Commissioner made a Declaration of Emergency in Massachusetts thus bringing into effect the Milk Pricing Order which is attacked by the Petitioners in this case. The Producers have a direct interest in sustaining the validity of the Milk Pricing Order under the Massachusetts statute in order to avoid the loss of their farms.

The Producers support the decision of the Massachusetts Supreme Judicial Court that upheld the constitutionality of the Milk Pricing Order, support the position of Respondent in this matter, and oppose the Petition for a Writ of Certiorari.¹

SUMMARY OF ARGUMENT

"As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. . . ."

Commissioner's Declaration of Emergency, January 28, 1992 (pages A56 and A57 of Petitioners' Appendices, hereafter cited "Pet. App. ____"). This finding, issued over 18 months ago, is itself the clearest summary of the Producers' main argument in this matter. The need of all dairy farmers in Massachusetts for an adequate price which at least approaches actual cost of production is acute. The importance of this industry to the state's

¹ The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

rural economy and environmental and social interests is so great that any further delay in the effectiveness of the Order cannot be justified. Since there is no discrimination against interstate commerce, and no conflict with decisions of this Court or of any United States court of appeals, the Petition should be denied.

ARGUMENT

I. THE MILK PRICING ORDER NEITHER DISCRIMINATES AGAINST OUT-OF-STATE PRODUCERS NOR RESTRICTS INTERSTATE COMMERCE

The Milk Pricing Order places an assessment on all fresh milk sold in Massachusetts. The assessment applies equally to all milk no matter where the milk is produced. It applies to milk produced in Massachusetts exactly the same as it applies to milk produced in Connecticut, New York or elsewhere. The assessment is paid pro-rata by all dealers selling in Massachusetts markets, so that there is no competitive disadvantage created among milk dealers. Moreover, because the assessment applies to milk from all sources, no incentive is created for dealers to buy milk either within or without Massachusetts. There is no competitive barrier at the borders of Massachusetts. All milk is treated alike, wherever it is produced.

Petitioners apply various pejoratives to the Milk Pricing Order, such as "economic protectionism and discrimination against competition in the Massachusetts milk market," incorrectly citing the Commissioner's own Findings in support of those allegations (Pet. 17). Such mis-characterizations are indeed necessary to the legal arguments raised by Petitioners here and throughout the history of this matter, but the fact is that the acts complained of do not operate at the level of interstate commerce. Rather, the assessment in question is imposed in Massachusetts on all fresh milk sold in Massachusetts, regardless of its source. It is exactly the system that would be implemented by a retail sales impost requiring each retailer of milk to pay to the Commissioner a stated amount per gallon sold.

No out-of-state farmer (or any other farmer) pays *anything* into the Commissioner's fund under the Milk Pricing Order. No out-of-state farm receives *anything* less for its milk under the Order. No dealer stands to save *anything* by buying milk in Massachusetts rather than in any other state. If the cost resulting from the Milk Pricing Order is not passed on to consumers, it is solely by reason of the dealer's decision to seek a competitive advantage by reducing its price as compared to other dealers.

The United States Court of Appeals for the First Circuit, in an opinion issued this month, upheld a district court's dismissal, for lack of standing, of a complaint by out-of-state milk producers seeking a declaratory judgment against the Order as violative of the Commerce Clause. *Adams v. Watson*, No. 93-1068 (1st Cir. decided August 13, 1993). The text of this decision is set out in the Appendix to this brief (hereinafter cited "App. __"). In its analysis of the actual injury alleged to be suffered by plaintiffs, the court examined the Order and its operation in considerable detail:

"The crux of the gloomy syllogism indulged in the second amended complaint is its major premise that the pricing order creates a disincentive for Massachusetts dealers to purchase plaintiffs' out-of-state milk. Leaving aside the absence of any allegation that a decline in demand has taken place, not only does the Massachusetts regulatory scheme not provide the disincentive hypothesized by plaintiffs,⁹ it *virtually ensures dealers an incentive to purchase out-of-state milk.*"

App. 9a. The footnote went on to explain:

"The differential assessments dealers must pay into the Fund are in no manner dependent on the *actual price* the dealer pays for milk or where the milk is produced. Therefore, with the important exception noted *infra*, the pricing order does not interfere with the dealers' incentive to buy the least expensive milk available, whether produced inside or outside of Massachusetts. Thus, if out-of-state milk indeed has sold at lower price than Massachusetts milk

since the pricing order became effective, as appellants allege, dealers will be motivated to buy lower-priced out-of-state milk rather than higher-priced Massachusetts milk. . . ."

Id. The exception referred to is the possibility that the Order may create an incentive for dealers to reduce net payments to Massachusetts farmers by buying less milk from them. However that may be, clearly the First Circuit Court of Appeals found no discrimination *against* foreign producers.

Repetition cannot make erroneous characterizations true. Petitioners frequently refer to the Milk Pricing Order as discriminatory and as protectionist. It does confer a benefit upon Massachusetts dairy farmers, as do many state actions designed to strengthen local industry (special real property tax exemptions, for example). In this instance, however, the effect on *commerce* between the states is neutral, since it does not distinguish between milk produced within Massachusetts and milk produced in other states.

II. THERE IS A CLEAR FACTUAL BASIS FOR THE COMMISSIONER'S FINDING OF AN EMERGENCY IN THE MASSACHUSETTS DAIRY INDUSTRY, THE CONDITION OF WHICH HAS FURTHER DETERIORATED OVER THE PAST EIGHTEEN MONTHS

Between 1980 and 1991, Massachusetts lost 48% of its dairy farms. Prices received by Massachusetts farmers for their milk in 1991 were the same as they had been in 1979. Costs of production over the same period rose dramatically: in the example of one farm the increase was approximately 400%. Today, Massachusetts dairy farmers are paid for their milk less than the cost of producing it -- by a significant margin. The continuation of this pattern will cause most if not all Massachusetts dairy farmers to go out of business and will result in the destruction of the dairy farming industry in the state.

These are the facts underlying this proceeding. Each of the foregoing statements is a finding contained in the May 20, 1991

"Report and Recommendations" prepared by a Special Commission established by the legislature to investigate and study the dairy industry in Massachusetts. These basic facts were reviewed and confirmed during hearings held in January 1992 by the Department of Food and Agriculture, Respondent herein, as summarized in its "Report Subsequent to Public Hearings" dated January 28, 1992 (Pet. App. A51). On the basis of the Department's investigation and Report, the Commissioner of Food and Agriculture issued the January 28, 1992 "Declaration of Emergency" quoted at the outset of the Summary of Argument (Pet. App. A56). Twenty-one days later, on February 18, 1992, the Commissioner published the Pricing Order (amended February 26, 1992) (*see* Pet. App. A41), which was designed to address the dairy farm crisis in Massachusetts and which has been the subject of an extensive course of litigation, including the present petition, brought by Petitioners to reverse the determination made by the Commissioner of Food and Agriculture.

Producers have participated as intervenors or as amici curiae in virtually all of the cases brought by Petitioners since the effort to stop the Milk Pricing Order was begun in February 1992. In these proceedings the Producers have attempted to bring to the various courts a first hand, ground level view of the importance of the Milk Pricing Order to their survival. Particularly in the twelve separate motions for preliminary or temporary injunctions or stays, the Producers have sought to make clear the urgency of putting the program into effect. Time is a major issue for the farmers whose livelihoods the Order was intended to help preserve. During the Petitioners' long campaign of litigation, too many additional dairy farms have gone under. For instance, on this August 27 and 28 one of the largest dairy farms in Massachusetts is going to auction: "more than 300 acres, several houses and buildings, farm machinery and 600 Holstein cattle" (*The Recorder* (Greenfield, Mass.), August 3, 1993, at 1).

Weather is critical in the economic lives of farmers. This summer the crisis in Massachusetts dairy farming has been intensified and accelerated due to the combined effects of mid-western floods and local drought. At the same time that grain

prices are increasing, Massachusetts farmers are suffering reduced corn and hay production from their own fields (*id.*). All of this has arisen after, and is in addition to, the findings of emergency in the dairy farming industry that gave rise to the Commissioner's Declaration of Emergency and Milk Pricing Order.

Petitioners state that, "The essence of the declaration was that Massachusetts dairy farmers are going out of business because they cannot compete successfully with dairy farmers in other New England states (A-53)." Pet. 6. The Commissioner has made no such finding, either at page A53 of Petitioners' Appendices or at any other place. Due to pervasive federal regulation, there is very little actual competition in the Massachusetts milk market. Indeed, because only a small percentage of fresh milk consumed in Massachusetts is produced locally, there is a premium on milk purchased out of state. *See Adams v. Watson*, App. 10a. But even with minor price variations, all New England dairy farmers are facing the same difficulty (*see* Pet. App. A57), for the problem is essentially one of actual costs continuing to increase well above the prices paid for milk in a market subject to broad federal regulation.²

III. UNDER THE PRECEDENTS OF THIS COURT, THE MILK PRICING ORDER IS A CONSTITUTIONAL EXERCISE OF A STATE'S POWER TO PROMOTE THE WELFARE OF ITS CITIZENS AND INDUSTRY

Petitioners attack the Milk Pricing Order solely on the ground that it is prohibited by the Commerce Clause of the Constitution:

² Petitioners also speak of a "war chest" received by Massachusetts farmers under the Order, and they argue (without citation of authority) that this benefit "would dull the competitive edge of the more efficient dairy farmers in other states." Pet. 7. There is no basis for these claims in the Commissioner's findings or elsewhere in the record of this case.

The Congress shall have Power....To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. I, § 8, cl.3.

From this declaration have flowed not only the array of affirmative federal powers that now reach to many aspects of interstate commerce, but also the limitations on the ability of states to impose burdens upon commerce among the states. Those limitations, arising at the intersection of federal power under the Commerce Clause and legitimate state police and taxing authority, have been considered by this Court in many cases. A broad and often cited formulation was set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

"Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Application of this standard leaves no doubt as to the propriety of the Milk Pricing Order under the Commerce Clause. The Massachusetts assessment is applied without discrimination to all milk, regardless of source; maintenance of a Massachusetts dairy farming industry is undeniably a legitimate public interest for all the reasons spelled out in the Commissioner's findings; and the effects on interstate commerce are at most incidental, since all dealers and producers are affected equally and no incentives are created for dealers to purchase milk in one state rather than another.

Indeed, it is a striking aspect of this case that Petitioners have been able to point to no burden on interstate commerce other than a few theoretical and speculative pronouncements contained in the untested affidavit of an "expert" whose principal fact prediction,

that the Order will increase the amount of milk produced in Massachusetts, was disproved by actual events during the limited time the Order was enforced. Even if he had been right, increased production is exactly the goal of the Milk Pricing Order. A state program of support for local industry is not made unconstitutional by its success; it is made unconstitutional by a showing that it improperly burdens interstate commerce. The expert did not address this issue.

The legitimacy of the purposes of the Milk Pricing Order has long been recognized by this Court, even in cases relied upon by Petitioners:

No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984). And more specifically:

"The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufactures does."

New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988).

The *Limbach* distinction between direct state action in support of local industry and such action taken in the course of regulating interstate commerce provides the rationale for not only the present case but also for the only decision of this Court relied upon by Petitioners in their claim that "The Decision Below Conflicts With Prior Decisions Of This Court. . ." (Pet. 16). That case is *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), which was decided before the institution of the federal milk price regulatory

program that largely eliminated price competition among dairy farmers within the same region.

The New York law in *Baldwin* prohibited the sale in New York of milk produced in other states unless the price paid was not less than that required to be paid to New York producers. The statute effectively eliminated price competition across state lines. Other than a simple import duty, there could be no clearer example of state regulation of interstate trade, and accordingly the law was found to violate the federal Commerce Clause.

As distinguished from the scheme in *Baldwin*, the Massachusetts Milk Pricing Order has no direct impact on interstate commerce. It is not a state support or subsidy effected "in connection with the State's regulation of commerce" since the state does not regulate in any way the movement of any milk. Rather, it is an effort by Massachusetts to assist its dairy industry by wholly internal action, an assessment on all Class I milk sold in Massachusetts.³

The Milk Pricing Order fits into the category of essentially local action approved in *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939), and *Opinion of the Justices*, 601 A.2d 610 (Me. 1991). In both of those cases the respective courts acknowledged the local interest sought to be served by the regulatory scheme in question, and in both cases the courts found that operation of the state action was essentially local while the impact on interstate commerce was merely incidental.⁴ The

³ The regulatory scheme in the present case bears superficial similarity to that of the Agricultural Adjustment Act's processing tax found unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936). *Butler*, however, involved the scope of the taxing power granted to the Federal government by Art. I, section 8, of the Federal Constitution, and found the processing tax to be outside that power. The Commerce Clause was "put aside as irrelevant" to the Court's decision, since federal and not state action was in question. 297 U.S. at 64.

⁴ The United States District Court for the District of Maine has just

Massachusetts Milk Pricing Order is essentially indistinguishable from a state farm extension program, or reduced state taxes for grains and feeds, or state financial support for industrial parks (as by the issuance of tax free bonds or the granting of tax concessions), or the efforts of New York City to retain its private financial institutions with various public economic incentives. As the Commerce Clause does not distinguish among forms of commerce, dairy farmers are entitled to the same benefits of state support as are granted regularly and without question to other commercial undertakings. From the perspective of the Commonwealth, a decision in favor of Petitioners here would mean simply that Massachusetts has no power to support its dairy industry with a uniform imposition on the sale of milk within the state.

The broader Constitutional principles enunciated in the *Eisenberg Farm Products* decision are also important in the present case. In approving state police power regulation of commerce flowing across state lines, Justice Roberts described some of the operative underlying issues:

"The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. . . . But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. . . . Every state statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens

upheld the validity of a statute of Maine which is essentially the same as the Milk Pricing Order involved in this case. *Cumberland Farms, Inc. v. LaFaver*, Civ. No. 92-70-P-H, (D. Me. decided August 3, 1993).

interstate commerce. . . . These principles. . . not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government.

306 U.S. at 351-2 (footnote omitted).

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS

Petitioners assert that the decision below is in conflict with two federal cases: *Marigold Foods v. Redalin*, 809 F. Supp. 714 (D. Minn. 1992), and *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992). Those cases involve state laws or regulatory schemes that reach into the stream of interstate commerce and affect directly the interstate purchase of milk by dealers as opposed to its sale within a single state. Moreover, no United States court of appeals has spoken as to either decision. Neither reflects a conflict between the decision below and decisions of United States courts of appeals. *Marigold Foods* was a ruling on plaintiffs' motion for a preliminary injunction, and the court applied the usual balancing test in which the possibility of irreparable harm to the respective parties, the probability that plaintiffs would prevail on the merits, and issues of the public interest were examined. There was no final decision, even at the trial court level, on the validity of the Minnesota statute and regulations complained of by plaintiffs.

Even if *Marigold Foods* were a decision of a United States court of appeals, it would not warrant grant of the Petition in the present matter. The regulatory scheme considered in that case set prices which dairy processors -- *i.e.*, dealers -- in Minnesota were required to pay for milk purchased in other states. This is the same arrangement as had been disapproved in *Baldwin v. G.A.F. Seelig*, the determination by one state of the price that must be paid for goods being imported from another state. As such, it constitutes intervention directly in the conduct of interstate commerce by the imposition of a regulatory scheme that eliminates any possibility of interstate price competition. The Massachusetts Order, on the other hand, does not seek to control

the price at which milk is purchased from producers either within or without the Commonwealth; rather, it imposes an assessment on the *sale* of milk in Massachusetts to Massachusetts consumers, without any discrimination as to the source of the milk.

Farmland Dairies v. McGuire, is similar to *Baldwin v. G.A.F. Seelig*, except that New York there sought to eliminate competition by requiring dealers to pay into a fund the difference between New York milk prices and those paid to out of state producers (789 F. Supp. at 1248). Again, the result was that the possibility of any price competition across state lines was eliminated, for however low the foreign prices went, the payment would be increased to keep the cost of acquisition of milk constant. In the *Limbach* analysis, this is not only state action designed to support local industry, but it was taken "in connection with the State's regulation of interstate commerce" -- that is, the direct and immediate regulation of the degree of price competition between producers within and without the state.

The Massachusetts Milk Pricing Order erects no barrier to trade or competition. No milk is barred from the Commonwealth, and no discrimination is made between local and foreign milk in the levying of the assessment. The Order operates equally as to all milk and solely at the local level, *i.e.*, at the point of *sale* in Massachusetts, without any reference to where the milk originally was purchased or at what price. The recent decision of the First Circuit in *Adams v. Watson*, discussed at pp. 4-5, *supra*, and set forth in the Appendix to this brief, fully supports the position of these amici in the present case.

In the absence of any direct barrier to interstate commerce, and of any conflict with any decision of this Court, or of a United States Court of Appeals, this is not a proper case for a grant of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD
Counsel of Record
JONES, DAY, REAVIS & POGUE
1450 G St., N.W.
Washington, D.C. 20005-2088
(202) 879-3939

ALLEN TUPPER BROWN
58 River Road
Gill, Massachusetts 01376
(413) 863-3100

Counsel for amici curiae

August, 1993

APPENDIX

Opinion of the United States Court of Appeals for the First
Circuit in *Adams v. Watson*, decided August 13, 1993

**United States Court of Appeals
for the First Circuit**

No. 93-1068

KENNETH ADAMS, SETH BUNKER AND
RODNEY HUDSON, *ET AL.*,

Plaintiffs, Appellants,

v.

GREGORY WATSON AS COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF FOOD AND
AGRICULTURE, *ET AL.*,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Selya, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Cyr, *Circuit Judge*.

Michael L. Altman with whom *Margaret A. Robbins* and
Rubin E. Rudman were on the brief for appellants.

Eric A. Smith, Assistant Attorney General, with whom *Scott Harshbarger*, Attorney General, was on the brief for
Commissioner of the Massachusetts Department of Food and
Agriculture.

Robert J. Sherer with whom Francis A. DiLuna and Roche, Carens & DeGiacomo were on brief for Massachusetts Farm Bureau Federation, Inc.

August 13, 1993

CYR, Circuit Judge. Plaintiffs-appellants, dairy farmers from New York and New Hampshire, instituted the present civil rights action against the Commissioner of the Massachusetts Department of Food and Agriculture ("Commissioner") for declaratory and injunctive relief from the alleged unconstitutional enforcement of a Massachusetts milk pricing order. The district court dismissed their complaint for lack of standing. We affirm.

I.

BACKGROUND

On January 28, 1992, the Commissioner declared a state of emergency in the Massachusetts dairy industry, based on findings that rising production costs and flat dairy prices were devastating the industry.¹ The Commissioner determined that a price stabilization system was necessary. The pricing order issued by the Commissioner on February 26, 1992, forms the focus of this appeal.

The pricing order established a "Dairy Equalization Fund" ("Fund"), into which each licensed milk distributor ("dealer") in Massachusetts is required to pay monthly assessments ("differential assessments") equal to one-third of the amount by which the \$15 price set by the pricing order exceeds the applicable federal minimum or "blend" price per hundredweight

¹ In 1991, for example, \$12.64 per hundredweight ("cwt") was the average milk price paid Massachusetts dairy farmers, whereas their average production cost was \$15.50 per cwt -- an average loss of \$2.86 per cwt.

("cwt").² The differential assessment applies to all milk sold in Massachusetts by licensed dealers, whether produced in Massachusetts or elsewhere.³ Notwithstanding the fact that dealers must pay the differential assessment calculated on all out-of-state and in-state produced milk, out-of-state producers, who supply most of the milk sold in Massachusetts, are not entitled to any disbursements from the Fund. The monies in the Fund are distributed monthly among *Massachusetts milk producers only*, in direct proportion to their sales to dealers, subject to a monthly payment cap to each Massachusetts producer equal to the differential assessment on 2000 cwt. Excess monies in the Fund are refunded to the dealers in direct proportion to their payments into the Fund. No Fund monies are withheld for program administration costs. The pricing order prohibits dealers from "unconscionably" increasing their milk prices to offset the differential assessments the dealers are required to pay into the Fund.

Plaintiffs-appellants, out-of-state producers, sell their entire milk production to West Lynn Creamery, Inc., a licensed Massachusetts milk dealer. Their original civil rights complaint demanded a judicial declaration that the pricing order is violative of the Commerce Clause,⁴ requested the return of all Fund

² The United States dairy industry is regulated by an extensive federal pricing system. The Secretary of Agriculture promulgates federal milk marketing orders, pursuant to the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601, *et seq.*, which establish minimum milk prices. The marketing order in effect in Massachusetts is New England Federal Milk Marketing Order No. 1 ("Order No. 1"). See 7 C.F.R. § 1001. The minimum milk price ("blend price") is calculated monthly, using a marketwide weighted average of the value of all milk sold during the preceding month.

³ The complaint states that Massachusetts produces only 10% of the milk sold in the state.

⁴ Commerce Clause violations may be redressed under 42 U.S.C. § 1983. See *Dennis v. Higgins*, 498 U.S. 439, 443-51 (1991).

monies previously disbursed to Massachusetts producers, and sought to enjoin further enforcement of the pricing order.

The first amended complaint contained generalized allegations of competitive injury and economic harm.⁵ On defendants' motion, the district court dismissed the first amended complaint, finding its "general allegations of economic harm . . . unsupported by any specific, factual allegations of injury . . ."⁶ *Adams v. Watson*, No. 92-11641-Z, 1992 U.S. Dist. LEXIS 19306, at *4 (D. Mass. 1992). The district court appropriately noted that there was no allegation that the plaintiffs were selling less milk in Massachusetts, unable to undersell their Massachusetts competitors, or receiving a lower price as a result of the pricing order.

The district court denied, apparently as futile, plaintiffs' motion to amend their first amended complaint by adding two paragraphs for the stated purpose of alleging "with greater specificity 'injury in fact' to meet the requirement of more 'specific, factual

⁵ Two nonproducer plaintiffs (milk *dealers*) voluntarily dismissed their claims following the Commissioner's motion to dismiss the original complaint. The remaining plaintiffs, appellants here, filed the first amended complaint, which dropped the dealer plaintiffs from the action and withdrew a claim for damages.

West Lynn Creamery, Inc., an original plaintiff, brought a separate state court action challenging the pricing order. On April 15, 1993, the Massachusetts Supreme Judicial Court ruled that the pricing order did not violate the Commerce Clause. See *West Lynn Creamery, Inc. v. Comm'r of Dep't of Food and Agric.*, 415 Mass. 8, 611 N.E.2d 239 (1993).

⁶ The first amended complaint merely alleged that the pricing order "has the same effect as a 'customs duty' or 'protective tariff' on the importation of milk produced in other states," "subsidizes Massachusetts farmers which causes the disorderly marketing of milk," causes out-of-state farmers, including plaintiffs, to suffer economic harm and competitive disadvantage because it subsidizes Massachusetts farmers, and may force out-of-state farmers, including plaintiffs, out of business.

allegations of injury."⁷ The district court summarily denied the ensuing motion for relief from judgment under Fed. R. Civ. P. 60.

⁷ The two new paragraphs in the proposed second amended complaint allege:

. . . a) the plaintiffs are denied the opportunity to profit from their ability to sell milk in Massachusetts at prices below the Massachusetts fixed minimum price of \$15/cwt (in the months of June and July, 1992, for example, out-of-state milk was selling for approximately \$12.50/cwt, \$2.50/cwt less than the fixed minimum price of Massachusetts milk);

b) the Pricing Order purposely creates a disincentive for dealers to purchase out-of-state milk, which has sold at a lower price (at least \$2/cwt lower) than Massachusetts milk since the Pricing Order went into effect; and

c) but for the protectionist structure of the Pricing Order, the plaintiffs would be able to undersell the Massachusetts dairy farmers.

The plaintiffs, and all out-of-state dairy farmers, have been and will be further "injured in fact" by the Pricing Order as follows:

a) the effect of the Pricing Order is to reduce the flow of raw milk into Massachusetts from out-of-state because the retail price increase to consumers (caused by a portion of the assessment being passed on as price increases to consumers) reduces the demand for milk;

b) as the demand in Massachusetts decreases, out-of-state milk is displaced because of the preference given to locally produced milk;

c) as out-of-state milk is displaced, the blend price received by dairy farmers falls (the Pricing Order only shields Massachusetts dairy farmers from this price decline);

d) Massachusetts dairy farmers have and will produce more milk as a result of the higher price that they receive for milk from the Pricing Order;

e) as the supply of Massachusetts milk increases, out-of-state milk is displaced because of the preference given to locally produced milk; and

f) as the demand for out-of-state milk in Massachusetts decreases from the effects of the Pricing Order, the premiums (the amount paid by milk dealers to dairy farmers above the federal minimum price) are undermined.

DISCUSSION

The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Although considered by many to be among the more confused doctrines in federal law, Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (1989); see also Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 221 (1988) ("the structure of standing law . . . has long been criticized as incoherent"); see, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970), the jurisprudence of standing is based on certain fundamental principles. *Whitmore*, 495 U.S. at 155. The requirement of "standing" is "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society" and involves "both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise."⁸ *Warth v.*

⁸ Prudential limitations on the exercise of federal jurisdiction -- self-imposed rules of judicial restraint -- may be invoked even if all constitutional essentials are present. As the Supreme Court has acknowledged, however, "it has not always been clear in the opinions of [the] Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." *Valley Forge*, 454 U.S. at 471. Nonetheless, at least three prudential principles bear importantly on "standing". First, the litigant must assert its own legal rights and interests, not those of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Second, claimants with "generalized grievances" shared by a large class of citizens raising "abstract questions of wide public significance" normally will be denied standing, as such questions are more appropriately addressed to the representative branches of government. *Valley Forge*, 454 U.S. at 475. Finally, the claim presented must come within "the zone of interests to be protected or

Seldin, 422 U.S. 490, 498 (1975).

In its constitutional formulation, the doctrine of standing is the gatekeeper of justiciability: Article III of the Constitution limits federal "judicial power" to the resolution of "cases and controversies," see U.S. Const. Art. III; only if it is presented with a "case or controversy" may an Article III court entertain an action. *Warth*, 422 U.S. at 498. See *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). The "irreducible constitutional minimum of standing" entails three elements:

First, the plaintiff must have suffered an "injury of fact -- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely" as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citations and internal quotation marks omitted); see also *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v.*

regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153.

In the instant case, appellees have not suggested that the appellant producers are asserting rights and interests other than their own; the complaint does not allege a "generalized grievance" more appropriately addressed to another branch of government; and appellants, as milk producers who ship in interstate commerce, would appear to be within the "zone of interests" protected by the Commerce Clause, see *Dennis*, 498 U.S. at 449 (Commerce Clause was intended to benefit those involved in interstate commerce and is the source of a right of action on the part of those injured by state regulation of commerce) (citing *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1976)).

Jacksonville, 113 S. Ct. 2297 (1993); *AVX*, 962 F.2d at 113; *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 424 (1st Cir. 1983). The responsibility for "clearly and specifically set[ting] forth facts sufficiently to satisfy the Article III standing requirements" rests with the claimant. *Whitmore*, 495 U.S. at 155-56; *see also Defenders of Wildlife*, 112 S. Ct. at 2136; *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 518; *AVX*, 962 F.2d at 114.

Like the trial court, we "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501; *see AVX*, 962 F.2d at 114. Nevertheless, we do not "credit bald assertions, [or] . . . unsubstantiated conclusions, . . ., nor . . . honor subjective characterizations, optimistic predictions, or problematic suppositions." *Id.* at 115 (citations and internal quotation marks omitted). "[E]mpirically unverifiable" conclusions, not 'logically compelled, or at least supported, by the stated facts,' deserve no deference." *Id.* (quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989)). Within this analytic framework, we examine appellants' claims.

Appellants contend that the first amended complaint was sufficient to demonstrate standing at the pleading stage, as specific facts need not be pleaded in support of general allegations of economic injury, and allegations of competitive harm have been found sufficient to satisfy the Article III standing requirements. Moreover, even if the first amended complaint was deficient, appellants argue, the second amended complaint corrected each deficiency identified by the district court. We are unable to agree with either contention. First, the allegations in the first amended complaint are too vague, generalized, and conclusory to plead cognizable economic injury or competitive harm. Second, close inspection reveals that the more particularized allegations proposed in the second amended complaint are not only conclusory, conjectural, and speculative, but illusory as well. We begin our analysis with the proposed second amended complaint.

The crux of the gloomy syllogism indulged in the second amended complaint is its major premise that the pricing order creates a disincentive for Massachusetts dealers to purchase plaintiffs' out-of-state milk. Leaving aside the absence of any allegation that a decline in demand has taken place, not only does the Massachusetts regulatory scheme not provide the disincentive hypothesized by plaintiffs,⁹ it *virtually ensures dealers an incentive to purchase out-of-state milk*.

Appellants overlook what may have been an inadvertent (but certainly significant) incentive under the pricing order for Massachusetts dealers to purchase as much milk as possible from out-of-state producers. The monies paid into the Fund by the dealers are disbursed *only* to Massachusetts producers, not to out-of-state producers. The monies remaining in the Fund after the Massachusetts producers have received their disbursements are *refunded* to the dealers. Thus, the less milk the dealers buy from Massachusetts producers, the more money remains to be redistributed among the dealers after the Massachusetts producers have been paid. The complaint evinces no competent allegation

⁹ The differential assessments dealers must pay into the Fund are in no manner dependent on the *actual price* the dealer pays for milk or where the milk is produced. Therefore, with the important exception noted *infra*, the pricing order does not interfere with the dealers' incentive to buy the least expensive milk available, whether produced inside or outside of Massachusetts. Thus, if out-of-state milk indeed has sold at a lower price than Massachusetts milk since the pricing order became effective, as appellants allege, dealers will be motivated to buy lower-priced out-of-state milk rather than higher-priced Massachusetts milk.

We recognize that plaintiffs likely intended to allege not that out-of-state milk has sold at a price lower than that for Massachusetts milk, but that it has sold at a price lower than the \$15 per hundredweight yield Massachusetts producers will have realized once they have received their Fund disbursements. Essentially, this simply restates the allegation that the pricing order places out-of-state producers at a competitive disadvantage because it subsidizes Massachusetts producers, a contention we address later in the opinion. *See infra* at pp. 14-19.

which would warrant the counterintuitive presumption that the dealers would act contrary to their own economic interests. Thus, other than pure conjecture and speculation, or conclusory theory, nothing in the proposed second amended complaint suggests that the pricing order will not *increase* dealer demand for out-of-state milk.

The second amended complaint further alleges that the protectionist structure established by the pricing order prevents plaintiffs from underselling their Massachusetts competitors. This anti-competitive scenario is based on the unstated assumption that out-of-state producers would attempt to sell their milk to Massachusetts dealers at prices below those paid Massachusetts producers when in fact, as the complaint elsewhere indicates, out-of-state milk historically has commanded *premium prices* in Massachusetts because in-state producers can meet only a small percentage of the state's demand for milk. This assumption is not only unstated, but plaintiffs allege no facts which could conceivably support it. As there is no suggestion that the pricing order will materially affect Massachusetts' status as an import state, *see supra* note 3, there is no rational basis for the conjectural assumption that out-of-state milk will cease to command a premium price. Moreover, the pricing order provides ample inducement for dealers to continue to pay a premium for out-of-state milk in order to realize larger refunds from the Fund. Thus, plaintiffs' assumption is belied by the overriding economic reality discussed above: dealers are not required to buy milk from Massachusetts producers and doing so bids fair to disadvantage the dealer financially, for the reasons already explained. So long as the dealer has an alternate out-of-state milk supply, the Massachusetts producer is a relatively unattractive source.

The two remaining allegations in the second amended complaint likewise depend on the faulty premise that the pricing order creates dealer disincentives to buy out-of-state milk. First, the complaint alleges that plaintiffs are denied the opportunity to profit from their ability to sell their milk in Massachusetts at prices below \$15 per cwt. Since the pricing order in no manner

prevents plaintiffs from selling their milk for less than \$15 per cwt., we presume that plaintiffs intend to suggest that the challenged order may hinder their efforts to *increase their Massachusetts sales* by capitalizing on their ability to sell milk for less than \$15 per cwt. For all that appears in the complaint, however, the net effect of the pricing order will be to foster rather than hinder out-of-state milk sales in Massachusetts, independently of any efforts by plaintiffs to bolster sales.

Second, the proposed second amended complaint forecasts the following scenario: (1) dealers will pass some portion of their differential assessments on to consumers in the form of retail price increases, causing a decrease in demand for milk in Massachusetts; (2) out-of-state milk will be displaced "because of the preference given to locally produced milk," (3) the federal blend price will fall, and the pricing order will shield only Massachusetts producers from the price decline; (4) Massachusetts farmers will produce more milk, displacing out-of-state milk because of the preference given to locally produced milk; and (5) as the demand for out-of-state milk decreases, the premiums paid to out-of-state producers will be undermined. Once again, however, the scenario portrayed in the second amended complaint is illusory, as it fails to take into account the strong financial incentive for dealers to purchase more out-of-state milk. Indeed, so long as dealers can recoup a greater portion of their differential assessments from the Fund by buying more out-of-state milk, there will be *less* pricing-order related costs to be passed on to consumers.

Therefore, shorn of their "problematic suppositions" and "[e]mpirically unverifiable conclusions, [neither] logically compelled, [n]or . . . supported," *AVX*, 962 F.2d at 115 (internal quotation marks omitted), the supplemental allegations of threatened injury propounded in the second amended complaint fail to demonstrate "injury in fact," the core "standing" requirement forming the basis for the district court's denial of the motion to amend.

Finally, we turn to appellants' contention that the more general allegations in the first amended complaint demonstrated standing. There can be no question that competitive harm may constitute "injury in fact" for standing purposes. The *Rental Housing Ass'n v. Hills*, 548 F.2d 388, 390 (1st Cir. 1977) (there is "no authority for the proposition that competitive harm is an insufficient allegation of injury in fact; [q]uite the contrary, the cases finding allegations of competitive injury sufficient are legion"); see also *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971) (investment companies had standing as competitors to challenge ruling by the Comptroller of the Currency authorizing national banks to operate collective investment funds); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (travel agents had standing as competitors to challenge ruling by the Comptroller of the Currency that national banks may provide travel services); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 152 (sellers of data processing services had standing to challenge ruling by Comptroller of the Currency that national banks may offer data processing services; injury in fact requirement met by allegations that competition by national banks might entail some future loss of profits and that respondent bank was preparing to perform data processing services for two of plaintiffs' customers); *Simmons v. ICC*, 900 F.2d 1023, 1026 (7th Cir. 1990) (finding competitive injury sufficient to satisfy the injury in fact requirement of standing), *cert. denied*, 111 S. Ct. 1308 (1991); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988) (same), *cert. denied*, 111 S. Ct. 1308 (1991); *Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1194 (7th Cir. 1981) (same); *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977) (distinct and palpable competitive injury is injury in fact for standing purposes even if economic injury is small in magnitude), *cert. denied*, 434 U.S. 1086 (1978).

The core allegation in the first amended complaint is that "[t]he [p]ricing [o]rder places out-of-state farmers, including the plaintiff farmers, at a competitive disadvantage because it subsidizes Massachusetts farmers, but not-out-of-state farmers, all of whom are selling milk in Massachusetts." Although we assume that this

allegation does not depend on plaintiffs' unfounded assumption that the pricing order will create a disincentive for dealers to purchase out-of-state milk, we cannot ignore the obverse reality that it overlooks the fact that the pricing order bids fair to *increase* dealer demand for out-of-state milk. Therefore, to that extent at least, the direct subsidy to Massachusetts producers is negated; that is, to the extent that dealers buy more out-of-state milk, there will be less subsidy paid Massachusetts producers. Moreover, aside from the inadequate amendments proposed in the second amended complaint, *see supra* at pp. 9-13, plaintiffs make no attempt to explain or demonstrate *how* the pricing order subsidy to Massachusetts producers will inflict economic *injury* or competitive *harm* upon plaintiffs, particularly in light of the strong financial incentives for dealers to buy more, rather than less, out-of-state milk, even at premium prices, in furtherance of their own economic self-interest and in response to the market reality that Massachusetts is almost totally dependent on out-of-state milk. It is simply insufficient, under any acceptable pleading standard, to rely on conclusory allegations based on pessimistic predictions and "problematic suppositions" that are both unexplicated and illusory. *See AVX*, 962 F.2d at 115.

We therefore agree with the district court conclusion that the first amended complaint was insufficient to assert "standing":

The fact that the [p]ricing [o]rder provides funds to Massachusetts farmers and not to out-of-state farmers does not, as plaintiffs suggest, establish that they have standing to challenge the [o]rder as invalid *per se* under the Commerce Clause. Instead, plaintiffs must allege facts to support their claim that the provisions of the [o]rder are discriminatory in purpose or effect *and that they, specifically, have suffered injury as a result*. Even reading the complaint in a light most favorable to plaintiffs, they fail to meet this burden.

Adams, 1992 U.S. Dist. LEXIS 19306, at *6 n.4.

Although the challenged pricing order provides a direct subsidy to one group of producers, and not to another group, absent plausible allegations that the supposed injury to plaintiffs is "(a)

concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical," *Defenders of Wildlife*, 112 S. Ct. at 2136 (internal citations and quotation marks omitted), it cannot be presumed that a subsidy will inflict cognizable economic injury or competitive harm upon the plaintiff group.

The first Circuit rule on pleading "standing" requires "heightened specificity." *AVX*, 962 F.2d at 115; see also *Munoz-Mendoza*, 711 F.2d at 425 ("[w]here 'injury' and 'cause' are not obvious, the plaintiff must plead their existence in his complaint with a fair degree of specificity"). We recognize the potential tension between our standard and the Supreme Court's nascent disaffection for certain heightened pleading standards developed in other contexts. See *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993) (federal courts may not apply heightened pleading standard in actions alleging municipal liability under 42 U.S.C. § 1983; heightened standard is in direct conflict with Fed. R. Civ. P. 8). There is no such tension in the present context, however, as the first amended complaint does not meet the pleading standards adopted in this circuit for ordinary cases—that is, for cases in which we have never imposed a "heightened" pleading standard. See generally *Boston & Me. Corp. v. Hampton*, 987 F.2d 855 (1st Cir. 1993) (containing extensive discussion of pleading requirements in this circuit and elsewhere) (Keeton, J.).

In an ordinary civil case, a motion to dismiss may be granted only if the complaint, viewed in the most flattering light, shows no set of facts which would entitle the plaintiff to relief. *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988); see *AVX*, 962 F.2d at 115 (describing *Gooley* as an "ordinary case"). As noted in *Gooley*, however, "minimal requirements are not tantamount to nonexistent requirements." 851 F.2d at 514. "Subjective characterization, devoid of a minimally sufficient factual predicate," simply does not suffice to "drag a defendant past the pleading threshold." *Id.* at 515; see *Resolution Trust Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993) (explaining that while factual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, this tolerance

does not extend to "legal conclusions" or to "bald assertions."); see also *Boston & Me.*, 987 F.2d at 863-64 (citing cases). Judge Keeton recently identified at least three rationales for requiring a minimal degree of particularity at the pleading stage:

First, a complaint that is too general will not "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." [*Conley v. Gibson*, 355 U.S. 41, 47 (1957)]. Accordingly, some distinction must be made between an adequate complaint and one that is too general. Second, rising litigation costs (and the associated impact of an improper threat of litigation) speak for requiring some specificity before permitting a claimant to "drag a defendant past the pleading threshold." *Gooley*, 851 F.2d at 515; see also [*Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 53 (1st Cir. 1990)]; *New England Data Services, Inc. v. Becher*, 829 F.2d 286, 289-91 (1st Cir. 1987). Third, the burgeoning caseload crisis in the district courts weighs in favor of earlier disposition of baseless claims. See [*Sutliff, Inc. v. Donovan Co., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984)].

Id. at 865.

The present case is not "ordinary," however, as the district court dismissed the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. Federal courts "are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS*, 493 U.S. at 231 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Although the Court recently suggested that, in the standing context, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim[.]'" *Defenders of Wildlife*, 112 S. Ct. at 2137 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)) (emphasis added), the Court has also explained that "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but

rather must affirmatively appear in the record." *FW/PBS*, 493 U.S. at 231 (citations and internal quotations omitted). Our cases are not to the contrary. See, e.g., *AVX*, 962 F.2d at 115 ("Because standing is fundamental to the ability to maintain a suit," the complainant's burden to "clearly alleg[e] facts sufficient to ground standing" cannot be satisfied by "purely conclusory allegations or by a Micawberish reading of a party's generalized averments;" rather, the complainant must "set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing."). In the present case, plaintiffs have presented no *factual* allegations to support their standing to bring the present action under any minimally acceptable pleading standard; rather, their complaint is filled with contradictory hypotheses and conclusory allegations. As appellants failed to set forth any plausible allegations of "injury in fact," despite ample opportunity to do so, the district court properly dismissed their motion to amend as futile.

Affirmed.

5
No. 93-141

Supreme Court, U.S.

FILED

NOV 15 1993

DEPT. OF THE CLERK

**In the
Supreme Court of the United States**

October Term, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

JOINT APPENDIX

PETITION FOR CERTIORARI FILED
JULY 14, 1993.

CERTIORARI GRANTED OCTOBER 4, 1993.

MICHAEL L. ALTMAN

Counsel of Record

MARGARET A. ROBBINS

RUBIN AND RUDMAN

50 Rowes Wharf

Boston, Massachusetts 02110

(617) 330-7000

Counsel for Petitioners

BATEMAN & SLADE, INC.

BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

132 PP

TABLE OF CONTENTS

	<i>Page</i>
Relevant Docket Entries in <i>West Lynn Creamery, et al., v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. 92-4610	JA4
Relevant Docket Entries in <i>West Lynn Creamery, Inc. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. 92-6914	JA5
Relevant Docket Entries in <i>LeComte's Dairy, Inc. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. 92-6924	JA6
Relevant Docket Entries in <i>West Lynn Creamery, Inc. et al. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. 92-J-867	JA7
Relevant Docket Entries in <i>West Lynn Creamery, Inc. et al. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. -92-P-1763	JA8
Relevant Docket Entries in <i>West Lynn Creamery, Inc. et al. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , SJC-6140	JA8
<i>Report and Recommendation of the Governor's Special Commission Relative to the Establishment of a Dairy Stabilization Fund</i> , dated May 20, 1991	JA10
<i>Findings and Declaration of State of Emergency</i> , Massachusetts Department of Food and Agriculture, dated January 28, 1992	JA25
Commissioner's Declaration of Emergency dated January 28, 1992	JA30
Amended Pricing Order dated February 26, 1992	JA32

	<i>Page</i>
West Lynn Creamery, Inc.'s Monthly Reporting Schedule for May 1992	JA41
Complaint in <i>West Lynn Creamery, et al. v. Gregory Watson, Commissioner, Massachusetts Department of Food and Agriculture</i> , C.A. 92-4610-G dated July 24, 1992 (without attachments)	JA44
Excerpts from Record of Proceedings Before the Commissioner of Food and Agriculture dated September 14, 1992 re West Lynn Creamery, Inc. Administrative Docket Nos. MD-9202, MD-9301, and MD-9347	JA55
Excerpts from Record of Proceedings Before the Commissioner of Food and Agriculture dated September 14, 1993 re LeComte's Dairy, Inc. Administrative Docket No. MD-9346 at S.J.C. Appendix pp. 805-806	JA62
Affidavit of Arthur Pappathanasi Submitted to the Commissioner dated September 3, 1992	JA65
Affidavit of Ronald D. Knutson dated September 3, 1992	JA68
Chart displaying Data from Massachusetts Department of Agriculture provided pursuant to G.L. c. 66, § 10 Submitted to Commissioner	JA82
Chart titled "Average Milk Prices per Hundredweight from January to June, 1992" Submitted to Commissioner	JA83
Decision of Commissioner of Massachusetts Department of Food and Agriculture Conditionally Revoking West Lynn Creamery, Inc.'s Milk Dealer's License, Administration Docket Nos: MD-9202, MD-9301, MD-9347, dated November 16, 1992 . . .	JA84

	<i>Page</i>
Decision of Commissioner of Massachusetts Department of Agriculture Conditionally Revoking LeComte's Dairy, Inc.'s Milk Dealer's License, Administrative Docket Nos. MD-9303 and MD-9346, dated November 16, 1992	JA91
Petition for Review of Commissioner of Massachusetts Department of Food and Agriculture's Decision in <i>West Lynn Creamery, Inc. v. Watson</i> , C.A. No. 92-6914, dated November 17, 1992 (without attachments)	JA98
Petition for Review of Commissioner of Massachusetts Department of Food and Agriculture's Decision in <i>LeComte's Dairy, Inc. v. Watson</i> , C.A. No. 92-6924, dated November 17, 1992 (without attachments)	JA103
Memorandum and Order of the Massachusetts Superior Court denying Plaintiffs' Second Emergency Motion for Preliminary Injunction dated November 24, 1992	JA108
Amendment of the Massachusetts Superior Court to Memorandum and Order Denying Injunctive Relief Entered on November 24, 1992	JA111
Order of the Massachusetts Appeals Court Staying on Conditions the Commissioner of Massachusetts Department of Food and Agriculture's Decisions Conditionally Revoking Petitioners' Milk Dealers' Licenses, No. 92-J-867, dated December 8, 1992 .	JA113
Opinion of Massachusetts Supreme Judicial Court in <i>West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture</i> , 415 Mass. 8, 611 N.E.2d 239 (1993)	JA118
Order of Massachusetts Supreme Judicial Court Staying Issuance of Rescript, No. SJC-06140, dated June 9, 1993	JA131

RELEVANT DOCKET ENTRIES**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT**

*WEST LYNN CREAMERY, INC. ET AL. V.
GREGORY WATSON, COMMISSIONER OF
DEPARTMENT OF FOOD AND AGRICULTURE*

CIVIL ACTION NO. 92-04610

July 24, 1992	Complaint
July 28, 1992	Plaintiffs' Motion for Preliminary Injunction
July 31, 1992	Application for Preliminary Injunction <u>DENIED</u> (Graham, J.)
August 7, 1992	Plaintiffs' Emergency Motion for Preliminary Injunction
August 14, 1992	Order on Plaintiffs' Motion to Stay Administrative Action and Motion for Preliminary Injunction: the plaintiffs' Motion for Emergency Relief is hereby <u>DENIED</u> (Graham, J.)
August 25, 1992	Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture
November 17, 1992	Plaintiffs' Second Emergency Motion for Preliminary Injunction
November 23, 1992	Commissioner's Opposition to Plaintiffs' Requests for Stay and Second Emergency Motion for Preliminary Injunction (in Nos. 92-6914, 92-6924 and 92-4610)

November 23, 1992	Hearing on Plaintiffs' Second Emergency Motion for Preliminary Injunction
November 24, 1992	Memorandum and Order Denying Plaintiffs' Second Emergency Motion for Preliminary Injunction (Murphy, J.) (in Nos. 92-4610, 92-6914, and 92-6924)
November 25, 1992	Amendment to Memorandum and Order Denying Injunctive Relief Entered on November 24, 1992 (Murphy, J.) (in Nos. 92-4610, 92-6914 and 92-6924)
November 24, 1992	Plaintiffs' Emergency Motion to Enjoin the Commissioner's Decisions Pending Interlocutory Review
November 25, 1992	Plaintiffs' Emergency Motion to Enjoin the Commissioner's Decisions Pending Interlocutory Review <u>DENIED</u> (Murphy, J.)
November 27, 1992	Plaintiffs' Notice of Appeal

**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT**

*WEST LYNN CREAMERY, INC. V. GREGORY WATSON,
COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
CIVIL ACTION NO. 92-06914*

November 18, 1992	West Lynn's Petition for Review of Administrative Decision
November 23, 1992	Hearing on Motion for Preliminary Injunction (see No. 92-4610)

JA6

November 25, 1992 Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture, re: Certified Copy of Record Proceedings

December 11, 1992 Joint Emergency Motion for Reservation and Report of Case to the Appeals Court

December 11, 1992 Stipulation (the Record of Administrative Proceedings filed in this matter is true and accurate)

December 11, 1992 Order Reserving and Reporting Case to Appeals Court Pursuant to Mass. R. Civ. P. 64 (Flannery, J.)

**COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT**

*LECOMTE'S DAIRY, INC. V. GREGORY WATSON,
COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
CIVIL ACTION NO. 92-06924*

November 18, 1992 LeComte's Petition for Review of Administrative Decision

November 23, 1992 Hearing on Motion for Preliminary Injunction (see No. 92-4610)

November 25, 1992 Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Department of Food and Agriculture, re: Certified Copy of Record Proceedings

December 11, 1992 Joint Emergency Motion for Reservation and Report of Case to the Appeals Court

JA7

December 11, 1992 Stipulation (the Record of Administrative Proceedings filed in this matter is true and accurate)

December 11, 1992 Order Reserving and Reporting Case to Appeals Court Pursuant to Mass. R. Civ. P. 64 (Flannery, J.)

**COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT**

*WEST LYNN CREAMERY, INC. ET AL. V. GREGORY
WATSON, COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
DOCKET NO. 92-J-867*

November 25, 1992 Petition for Interlocutory Review and Request for Oral Argument

November 25, 1992 Order Staying License Revocations Pending Consideration of this Petition and Further Order of the Court (Armstrong, J.)

December 8, 1992 Order Staying on Conditions Commissioner's Decisions (Armstrong, J.)

**COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT**

*WEST LYNN CREAMERY, INC. ET AL. V. GREGORY
WATSON, COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
ACTION NO. 92-P-1763*

December 14, 1992 Emergency Motion for Injunction Pending
Appeal and/or Motion for Reconsideration
of Order Dated December 8, 1992

December 15, 1992 Order Consolidating Civil Action Nos.
92-04610, 92-06914, and 92-06924

December 16, 1992 Order Denying Emergency Motion for
Injunction Pending Appeal and/or Motion
for Reconsideration of Order Dated
December 8, 1992 (Armstrong, J.)

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH**

*WEST LYNN CREAMERY, INC. ET AL. V. GREGORY
WATSON, COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
SJC-6140*

December 21, 1992 Order transferring, *sua sponte*, Appeals
Court No. 92-P-1763 to the Massachu-
setts Supreme Judicial Court

December 22, 1992 Transferred from Appeals Court: Brief
and separate Appendix (Vols. I and II)
for plaintiffs/appellants; Brief for
defendant/appellee

January 6, 1993 Oral Argument Held

April 15, 1993 Opinion Issued

April 28, 1993 Plaintiffs' Emergency Motion for Stay of
Issuance of Rescript Pending Review by
the United States Supreme Court

April 30, 1993 Commissioner's Opposition to Motion
to Stay Issuance of Rescript

May 5, 1993 Motion for Stay of any Order which the
Court may Issue Relative to the Injunc-
tion Entered by the Single Justice of the
Appeals Court on December 8, 1992

May 10, 1993 Commissioner's Opposition to Motion
to Stay Order

June 9, 1993 Order Staying Issuance of Rescript

August 5, 1993 Notice of Filing of Petition for Certiorari
from the Clerk of the United States
Supreme Court

October 4, 1993 Petition for Writ of Certiorari Granted by
the United States Supreme Court

**REPORT AND RECOMMENDATION
OF THE GOVERNOR'S SPECIAL COMMISSION
RELATIVE TO THE ESTABLISHMENT
OF A DAIRY STABILIZATION FUND**

**Presented To:
Submitted By:
Dated:**

**General Court
Special Commission
May 20, 1991**

MEMORANDUM

To: General Court
From: Special Commission
Dated: May 20, 1991

Subject: Results of Study and Recommendations
Establishment of Dairy Stabilization Fund

REPORT SUBSEQUENT TO PUBLIC HEARINGS

I. Establishment of Special Commission

Recognizing the critical situation, the General Court, on December 20, 1990, resolved that a special commission be established to investigate and study the dairy industry in Massachusetts. The commission was charged with holding at least one public hearing and reporting to the General Court the results of its investigation together with the recommendations and draft legislation necessary to carry out the recommendations.

The commission, in conjunction with the Department of Food and Agriculture, held three public hearings and met on several occasions to discuss the necessary recommendations. Below is a discussion of the testimony received at the public hearings, the results of the investigation and the recommended course of action.

For your consideration and assistance, a statement of the history of the current crisis affecting the local dairy farmers, an explanation of the federal and state regulatory systems governing fluid milk sales, and a summary of the testimony by comment area are provided.

II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on May 6, 1991; One Ashburton Place on May 7, 1991 and the Worcester Horticultural Society on May 7, 1991 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

Published in:

- Springfield Union news on April 15, 1991.
- Boston Herald on April 15, 1991.

Filed with:

- Executive Office of Communities and Development
- Secretary of State, Regulations Division

Approximately 317 people attended the public hearings; 87 people presented oral testimony; 87 submitted written testimony.

(References in this report to "the Department", unless the context indicates otherwise, means the Department of Food and Agriculture.)

III. Introduction

Massachusetts dairy farmers have been the stewards of the commonwealth's land since the first decade of the sixteenth century. Since that time, they continuously provided the citizens of this Commonwealth with an abundant supply of an

essential commodity: fresh milk. It has only been during the past ten years that the local dairy farmers have been forced to sell their farms due to drastic losses of income. They have either gone bankrupt or been forced to sell their land as it became impossible to operate the farm as a sustainable business.

This loss of profitability was not due to the farmers' mismanagement or inefficiency. They became the subjects of an industry slowly being overrun by big business in the larger milk producing states in the mid-west. From 1980 to date, Massachusetts has lost 434 farms, a decline of 829 to 395: approximately 48% of our dairies.

Right now, our farmers are facing a crisis. The price of milk, established by a complex set of federal regulations, has declined 30% in the past year and, in fact, is at the same level as set by the federal government in 1978. Although the cost of production has increased over the last thirteen years, farmers are being paid a price for their product at a level \$3.00/cwt below their cost of production. Much of the problem stems from the archaic system which governs pricing of milk.

It is undisputed, by farmers and dealers, that if the price paid to farmers for their milk is not significantly increased immediately, a majority of the remaining Massachusetts dairy farmers will be forced out of business within the year. The importance of supporting this industry, and the nearly 300,000 acres of well maintained open land it preserves in the Commonwealth, was emphasized throughout the hearings. Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education.

We are all aware that taking action to provide the farmers with a fair price for their product may cost the milk consumer money, but, a loss of these local farms will cost the consumer more, both monetarily and environmentally.

IV. Federal Price Setting Scheme

In order to understand the reasons Massachusetts farmers are facing the current problem, it is necessary to review the system which establishes milk pricing. For a majority of the country, the price which farmers are paid for their milk is established by the federal government. The Agricultural Agreement Act was established by Congress in 1937 in order to protect the dairy industry and ensure the survival of dairy farming. The Act provides for a creation of federal milk marketing orders which create a complicated system for determining what price farmers will be paid for the milk they produce. The original intent being to stabilize prices to ensure a continuous supply of milk.

The base price for this system is established by a monthly survey of farmgate prices for "manufacturing" milk in Minnesota and Wisconsin, the "M-W price". The M-W price is the average price paid by approximately 110 cheese, butter and powdered milk manufacturing plants for Grade B milk in the Minnesota-Wisconsin area. (Grade B Milk cannot be sold for fluid consumption. It can only be used for manufactured products).

These plants in the Minnesota-Wisconsin area pay a price for milk which is a total free market price and is influenced by factors such as milk supply/seasonal supply, feed costs, and price supports. There is no regulatory system which determines what these plants must pay to the dairymen in these areas. Each month a survey is taken to determine the average that these plants pay for milk. That average becomes the M-W price — in essence the basis upon which the price of milk virtually everywhere else in the U.S. is determined.

When there is a surplus of milk, the federal government (via its purchases) becomes the major factor in the milk market and the federal support price (the minimum price the government will pay dairy farmers for their [Class B] milk used to

make manufactured dairy products) sets the M-W price. The huge factory farms in California and the Southwest are primarily responsible for creating these surpluses by using taxpayer-subsidized water to raise feed year-round and produce enormous quantities of cheap milk.

The ultimate price paid to farmers in other areas of the country are determined through a complex and convoluted formula which supposedly makes allowance for regional differences in production costs, supply and demand, ultimate utilization of the finished product, etc. Regrettably, this formula, however effective it may once have been, no longer reflects the distinct and unique needs of the New England region in general nor Massachusetts in particular.

The M-W price does not adequately reflect the significantly higher costs of maintaining an agricultural enterprise in this area of the country, particularly since the industry in the M-W region consists largely of "factory farms", with huge herds, vast acreage, and the ready availability of both supplies and labor, as opposed to New England where small, family operations are the rule. Another inequity of the current procedure is that every facet of production is not always calculated into the federally-mandated price. For example, the state of California has become a huge supplier of low-cost milk in recent years, a fact made possible by the ready availability of water from various federally-funded projects. This essentially provided an invisible subsidy to the California milk industry at the expense of other areas of the country.

Recent events demonstrate that this system no longer accomplishes its goal nor provides a stable, minimum price for dairy farmers operating in New England and the northeast. The January, 1991 blend price for Federal Milk Order I was twenty seven percent (27%) less than the January, 1990 price. This represents the largest year-to-year change in the history of the New England Order. This precipitous drop in the federal

market order price of milk is part of a decade-long trend of decreasing prices paid to farmers that poses an unprecedented threat to the viability of the region's dairy industry.

The average Northeast dairy farmer's 1989 milk price was \$14.46 per hundredweight (cwt: 100 pounds of milk: 11.6 gallons). This was \$1.41/cwt higher than in 1988 and represented their best year of the decade. Nonetheless these prices were still below 1979 levels. Net earnings per cow in 1979 was \$249 compared to \$121 in 1989.

Not only did prices continue to fall but, the costs of production rose, health standards became more stringent, and production equipment became outdated. Dairy farmers' cost of producing milk increased by \$1.00/cwt. in 1989 to \$13.95/cwt. This figure does not include a return on the \$33.00/cwt. of the farmer's own equity invested in his or her business. Higher feed prices caused expenses to increase by \$61.00 per cow or \$.32/cwt. The average dairy farmer's interest expense increased \$21.00 per cow in 1989.

Presently, there is no commodity, with the possible exception of alcoholic beverages, as heavily regulated and controlled as is the milk.

V. Other New England States

The problem discussed above is not unique to Massachusetts. The other New England states also recognize the crisis facing their dairy farmers. While these states have all discussed entering into a regional compact to set uniform prices throughout the region, it is acknowledged by those involved that such a compact could take as long as five years to go into effect; requiring Congressional approval.

Although these states are reviewing legislation to implement the compact, they recognize the need for immediate action and each have legislation pending to raise the price paid

to their dairy farmers. These states include Maine, Vermont, New Hampshire, New York, Connecticut and Rhode Island.

VI. Testimony

Participation at the hearings was extensive. Realizing the broad impact of the problem, a diverse group of people presented both oral and written testimony including consumers, land preservationists, environmentalists, sportsmen, business people, farmers, milk handlers and dealers, local officials and state representatives and senators.

Attached are the sign in sheets from the hearings for those people who presented oral testimony. A list of names of the persons who submitted written comments, or a copy of the comments, is available upon request.

VII. DISCUSSION OF TESTIMONY

For organizational purposes, the areas of comment are organized by interest groups and the particular concerns relating to the crisis:

CONSUMER/PUBLIC

Through over nine hours of public testimony, not one voice spoke out in opposition to increasing the price farmers are paid for their milk. Rather, uniformly, these constituents expressed concern over losing the rural character of Massachusetts. Many of the people who testified identified their interest in the situation relating to the preservation of farmland and open space. The overriding concern was not that the retail price of milk would be raised, but that the natural characteristics of the Commonwealth would be gone forever if we lost our dairy industry.

In reality, the estimated two cent increase per quart of milk would not be noticed by the consuming public. There is already a great disparity in price, about twenty cents per gallon, between the different brands of milk sold in stores. In addition, the price of milk in Massachusetts is twenty six cents a gallon less than the national average. Most importantly, although the price paid to farmers for their milk has dropped thirty percent in the last year, the retail price has not decreased proportionately. The consumer has not benefitted from the lower milk price as the retail stores continue to reap the profits.

Consumers are not adverse to paying an additional two cents in order to "save" the local dairies. These constituents realized that the benefits received by the citizens of Massachusetts far outweigh any minor increase in the retail price of milk. Farmers have always been very generous with sharing their land and allow the public to utilize this 300,000 acres for a variety of activities including horseback riding, snowmobiling, skiing, hunting and fishing.

The National Rifle Association, the sportsman's clubs and land trusts have unanimously spoken out in favor of supporting the dairy industry. They stress the fact that if these acres are not preserved, a national heritage, accessible open space and the character of our land will be lost forever.

Environmental groups also stressed that this land provides increasingly necessary habitat for wildlife and protects the land from development and further environmental degradation. One national group also stressed that small farmers are better able to control their use of pesticides and protect our resources than large scale agri-businesses.

Most importantly perhaps, the consumers realize that if local dairies are not producing, our milk will be trucked in from other states like Pennsylvania and Ohio. As an extremely perishable item, the milk will not be as fresh, will not be able to be retained for long in the stores or at home and will support

the dairy industries of other states for an even higher cost to the local consumer. It costs an average of four cents per hundredweight (.40/cwt) to ship milk every 100 miles.

If our local supply of milk is not protected, the Massachusetts consumer's cost of milk will greatly increase and the citizens of Massachusetts will become entirely dependent on other states to ensure a supply of an essential commodity. The public unconditionally supported an increase in the price farmers are paid for their milk, stressing that their interests are not in conflict with that of the farmers. The inevitable harms associated with the loss of the dairy farmer are far greater than the potential rise in milk prices.

RELATED AGRICULTURAL BUSINESSES

The loss of these farms will not only impact the dairy farmers, but the effect will ripple into a variety of related businesses. Many of the people who testified are operating agriculture related companies such as farm equipment sales, feed stores, artificial insemination services, farm credit institutions and the like. Each of these groups are in favor of the state increasing the amount dairy farmers are paid for their milk.

As each dairy farm goes out of business, these related industries lose a customer and find it less and less profitable to stay in business in Massachusetts. These businesses may also not be paid on amounts owed for many months, or not at all. As each one of these businesses decides to close their local offices, other farmers, both dairy and non-dairy, are effected. Each farmer has to travel farther to obtain these services, continually increasing the cost of their production.

These businesses have already noted that their accounts receivables are down considerably since last year. As generators of millions of dollars of income, these businesses are an integral part of our states economy and will contribute to the states eco-

conomic hardships if forced to move their offices to neighboring states. It is important that the infrastructure of the agricultural businesses of this state are preserved. Increasing the amount farmers are paid for their milk will insure the future viability of the related community.

DAIRY FARMERS

A majority of the offered testimony was provided by the state's dairy farmers, in unequivocal support of the establishment of a milk price higher than the federal milk order price. The farmers stated that they are not looking for a "hand out" but they are asking that they get paid a "fair" price for their product. As the sale of milk is not based upon a free market system, Massachusetts farmers have no control over the price they are paid for their milk. It is the federal and state governments obligation to establish a price for milk which will stabilize and ensure the future viability of the dairy industry.

At the focal point of the farmers testimony was the fact at the current price they are paid for their milk is the same price as they were paid in 1979. The overall price for milk has steadily been declining over the last ten years whereas the cost of production has continually increased. Clearly, this presents an extremely bleak picture to our farmers.

Virtually every factor of production required in their business has significantly increased in cost since 1979. Although each farmer is operating under a unique set of conditions, the experience of one farmer may serve to illustrate the problem:

In 1979 this farms feed bill was \$38,700, today it is \$108,000; fertilizer costs of \$4,675 have now grown to \$34,330; utilities have risen from \$2,220 to \$11,020; insurance costs have risen from \$1,146 to \$6,074; tax levies have gone from \$2,065 to

\$14,878, rent from \$1,040 to \$6,390 and interest payments from \$350 to \$7,737. Even a minor item, such as sawdust bedding for the animals, has increased from \$155 to \$7,410.

The operating expenses for this farm have increased approximately 400% and yet, they are receiving the same price for their milk as in 1979. Clearly, they can not continue to operate on this basis for very long.

Furthermore, most Massachusetts farms have increased production significantly over the years, in some instances as much as 20% and more. Thus, the problems facing the industry are not the result of inefficient operations or mismanagement. Similarly, it has been suggested that farmers, in attempting to raise their incomes, have increased production to the point where they have created a surplus of the product, glutting the market and lowering prices. On the other hand, it is generally agreed that any surplus production of milk amounts to only some 6% over present consumption levels. It does not seem reasonable to argue that an oversupply of only 6% of any product would result in a drop of nearly 50% in wholesale prices on the total amount of that product produced nationwide. In either event, the surplus is not created by Massachusetts farmers as a heavily consuming state, this Commonwealth only produces approximately one third of the milk we consume.

As indicated, the problem facing the Massachusetts dairy farmer is a drastic decline in milk prices with increases in cost of production. It is estimated that it costs an average of \$15.00/cwt to produce milk. The Order 1 blend price paid to farmers for their milk in April of 1991 was \$11.94; resulting in a loss of \$4.06 for each cwt produced.

Not only is the economic tightrope getting longer for the producers, their safety rope is also slipping. Each spring

many farmers borrow funds to purchase supplies, including fertilizer and seed, for their yearly planting. This amount is then repaid in the fall, after the peak production season. As the Farm Credit Bank estimates that the farmers cost of production is higher than the amount paid for the product, they are continually refusing to extend credit. Without the ability to produce the feed for the cows, and a lack of money to purchase feed, the farmer is unable to maintain the herd.

There is no other industry in which a producer has no choice but to sell his product below cost at an artificially set price. Without an increase in their price, the dairy farmers have stated that they will have no alternative but to sell their farms for development and abandon the way of life which their families have chosen for several generations.

DEALERS

The Association of New England Milk Dealers has submitted testimony in support of a price increase for fluid milk. The milk dealers realize that their success is tied to the survival of milk producers. Since the dealers operate on a regional level, however, their testimony stresses the need for a regional solution — to place all dealers on an equal purchasing field.

As acknowledged earlier, all the New England states realize that a regional compact is desirable in order to sustain the regional dairy industry in the future. Such a compact, after authorization by Congress, would allow the states to negotiate for the terms and prices for milk purchased within the entire region. In the interim, prices must be raised within each state. The dealers do not oppose a price increase, but have expressed concern over the funds being deposited into a state account for redistribution, and not paid directly to the farmers.

Practical aspects of a price increase require that monies generated from the increase be placed into a fund and redistrib-

uted to the farmers in relation to the amount of milk produced by them. So long as a trust account is established for the placement of these funds, the dealers fear — that the money will be deposited into the general fund and appropriated for other uses — is unfounded. The envisioned scheme is not a tax, and the monies would not be deposited into the general fund. The necessary program would raise the price a farmer receives for his milk and the money would be distributed, from a trust fund, to the farmer.

So long as the pricing increase is applied equally to all dealers, those located within and out of state, dealers selling in Massachusetts will not be placed at a disadvantage. Furthermore, since the dealers negotiate the price they are paid for their product on a free market basis, they can pass any increased cost along to the retailer, and eventually the consumer who supports this increase.

VIII. CONCLUSION

An increase in the price Massachusetts dairy farmers are paid for their milk is essential. As the cost of production is approximately \$15.00 and the current blend price they are paid by handlers is \$11.94, and increase of 4.06/cwt is warranted. Since, however, the federally established price of milk is constantly changing, the increase should be based on a sliding scale to meet the intent of the program: to stabilize milk prices and ensure the viability of the Massachusetts dairy industry.

This increase can be accomplished by adopting legislation mandating the dealers to pay an established amount, based on the amount of fluid milk they sell in Massachusetts, into a fund. The money in this fund would then be distributed back to the farmer, providing them with a fair price for the milk.

By establishing this increase, the Commonwealth will acknowledge its commitment to ensuring that its citizens are provided with a supply of fresh milk; promoting the survival of our national heritage; promoting agricultural industries; maintaining an educational foundation for future generations; preserving our ever decreasing open lands and tourism; and establishing preserves for wildlife and recreation.

IX. RECOMMENDATIONS

After extensive study, the Governors Special Commission Relative to the Establishment of a Dairy Stabilization Fund recommends the House Bill No. 4390, as amended, be adopted; and review of House Bill No. 1964 (Compact) commence immediately. Upon redraft, the Compact should be adopted as soon as possible.

FINDINGS AND DECLARATION OF STATE OF EMERGENCY IN THE MASSACHUSETTS DAIRY INDUSTRY

MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

Dated: January 28, 1992

REPORT SUBSEQUENT TO PUBLIC HEARING

I. Petition to Hold Public Hearings

On November 13, 1991 a petition was delivered to the Department of Food and Agriculture, requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts and declare that a state of emergency exists. The petition was filed pursuant to M.G.L. c. 94A section 12.

The petition and signatures were reviewed and it was confirmed that at least twenty five percent of the licensed producers of milk within the petitioning market areas signed the petition under the pains and penalty of perjury. In fact, approximately fifty percent of the state's dairy farmers signed the petition.

In response to the petition, the Commissioner held two public hearings this week. Based upon the information already available to the Department and the Report of the Special Commission dated May 1991, the situation warranted that the Commissioner also hold hearings pursuant to sections 10 and 11 of the statute, and ascertain what prices, terms and conditions relative to milk would be most beneficial to the public interest and would best protect the milk industry. Therefore, complete investigatory hearings were held in relation to the entire milk industry.

II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on January 15, 1992; and One Ashburton Place on January 14, 1992 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

Published in:

- *Daily Hampshire Gazette* on December 21, 1991.
- *Boston Herald* on December 21, 1991.

Filed with:

- Executive Office of Communities and Development
- Massachusetts Municipal Association
- Secretary of State, Regulations Division

Sent by first class mail or facsimile to:

- All licensed milk dealers
- Agri-Mark and Mass. Milk Producers Cooperatives
- Massachusetts Farm Bureau
- *Country Folks*

Approximately 260 people attended the public hearings; 83 people presented oral testimony; 86 submitted written testimony. Additionally, some 10,000 consumers from across the Commonwealth signed a petition calling for equitable returns for dairy farmers.

III. Introduction

In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by

the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein.

Since that time, little has changed to improve the situation confronting these farmers. In fact, the situation has only become more desperate. As during the previous hearings, no testimony was received indicating that a crisis does not exist. Evidence was presented from various sectors of the public, not only dairy farmers. Testimony was received from consumers, agricultural industries, economic and financial experts, environmental groups, milk dealers, sportsmen's associations, educators, other agricultural commodity groups, as well as state legislators from both political parties.

IV. Investigation

Updates on Prices:

In 1990, the average federal blend price paid to Massachusetts dairy farmers (prior to deductions for trucking, cooperative dues, advertising allotments, stop charges, etc.) was \$14.67 per hundredweight (cwt), approximately 11.6 gallons. In 1991, the average blend price was only \$12.64. Given that the Special Commission's report estimated the average cost of production at \$15.50, and the current testimony supports this fact, our dairy farmers lost an average of \$2.86/cwt last year.

One of the farmers testified that his production of 240,000 lbs of milk per month translates to a loss of approximately \$6,864 each month. It is not surprising that our dairy farmers, who not long ago were debt free, are no longer able to pay for feed for the cows, have been forced to mortgage homes which have been in their families for generations, are working

twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families.

A prime example of the financial crisis facing Massachusetts dairy farmers is illustrated by the fact that one of the state's largest dairy producers, whose family farmed for three generations, were forced to auction their herd this past summer. They reported that during the past year alone, milk income was down twenty seven percent, representing a loss of \$134,540 in milk income. For both 1990 and 1991, even with a twenty three percent reduction in expenses, their expenses exceed their income resulting in net losses for the farm. Without a savings account, they would not have been able to survive and, not seeing an end to their losses, they chose to make the choice to sell.

The testimony is fraught with accounts of losses and pleas for immediate redress. As during the Special Commission hearings, the testimony stresses that the price farmers are paid for their product is approximately the same as in 1978. At the same time, the uncontrollable costs of production have continued to rise. The costs of health insurance, car insurance, home insurance, equipment, heating, electricity, education, worker's compensation, taxes, feed and food, to name only a few expenses, have increased considerably since 1978.

"An Economic Analysis and Forecast of Massachusetts Dairy Farmer Exits," prepared by Professor Lass of the University of Massachusetts, predicts that without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

During the summer of 1991, an "Over Order" premium was established by the Commissioner. This Order, provided the dairy farmers with an average of \$.74/cwt over the blend price.

Unfortunately, this pricing could not be maintained since New York was forced to discontinue its own over-order pricing. Since New York is by far the largest milk producer in the region, this action led to the collapse of the Massachusetts Over-Order. This type of stabilization remains necessary in order to ensure a continued production of a supply of fresh milk.

If no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances. In fact, Wisconsin farmers have petitioned the USDA to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping.

Update on other states' actions:

Since last year, the entire dairy industry has indicated that it is facing a disaster. New England states are pursuing every avenue possible to prevent the demise of their dairy farmers. Maine passed legislation placing a tax on milk, giving a portion to the farmers, a portion to the WIC program and a portion to fund the farmland preservation program. Vermont has eagerly been awaiting developments in other states, such as a regional interstate compact, while New York farmers may petition for another Over Order.

As each state is unique, Massachusetts needs to find a solution suitable to its dairy industry, recognizing that we are currently the largest fluid milk consuming state in the Northeast. While we continue to pursue a regional solution, the current situation cries for immediate action. Although we acknowledge the milk dealers' desire for a regional pricing structure, we must ensure the survival of our indigenous dairy production while this avenue is aggressively pursued.

V. Conclusion

In order to alleviate the situation facing the our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England. This system must also address the regional character of the flow of milk and the need to provide consumers with a high quality product at a reasonable price.

An "Over Order" assures the Massachusetts dairy farmer a price "over" the federally established price, based upon the unique circumstances facing each state. The Department should prepare regulations, in the nature of an Over Order, which would create a mechanism ensuring the Massachusetts dairy farm an amount "over" the federally regulated blend price for milk. The Department should provide the mechanism for payment, and all funds should be collected only on behalf of Massachusetts producers. Any excess should be returned directly to dealers, with no amount taken out for administration of the program.

In addition, every effort should be made to pursue a regional compact. Although this solution is a long term goal, requiring adoption of an identical compact in at least four states and congressional approval, Massachusetts, as a large consuming state, will play a pivotal role in the potential future of any such compact.

COMMISSIONER'S DECLARATION OF EMERGENCY

As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. I reach this conclusion after a series of

investigatory hearings and reviewing testimony from farmers, consumers, and experts from various facets of this complex industry.

These findings confirm the conclusions reached last May by the Special Commission on Dairying. Today, however, the crisis is more serious and the need to act more pressing. Regionally, the industry is in serious trouble and ultimately, a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem.

Signed this 28th day of January 1992.

GREGORY C. WATSON
COMMISSIONER

AMENDED PRICING ORDER

Pursuant to Massachusetts General Laws Chapter 94A Sections 10, 11, and 12, the Commissioner hereby Orders that each licensed milk dealer comply with the following Pricing Order:

I. Preamble

The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices.

This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk.

II. Definitions

- A. The terms used in this Order shall be defined in accordance with M.G.L. c. 94 and 94A, and for the purpose of this Order, the following words shall have the following meanings:

Committee: The Massachusetts Dairy Industry Committee.

Dealer: any person who is engaged within the Commonwealth in the business of receiving, purchasing,

pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.

Dealer-retailer: a person who is a dealer and who also sells at retail the milk handled for sale, shipment, storage or processing within the Commonwealth.

Producer: any person producing milk from dairy cattle.

Producer-Dealer: a dealer who also produces a portion or all of the milk they handle.

Sub-dealer: any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

III. Massachusetts Dairy Industry Committee

- A. The Commissioner shall establish the Massachusetts Dairy Industry Committee to assist in administration of this Order, and advise the Commissioner on pursuit of a regional milk marketing strategy.
- B. The Commissioner shall request that a representative from each of the following sectors of the milk industry participate on the Committee chaired by the Commissioner, or his designee: a dairy farmer, a co-operative representative, a milk dealer, a producer-dealer, a retailer, and a member of the Board of Agriculture. The Secretary of the Executive Office of Consumer Affairs or their designee, and

the Secretary of the Executive Office of Economic Affairs or their designee may sit on the Committee as additional advisory members.

- C. Every three months, the Department shall submit a summary of the monthly reports and any other relevant information to the Committee to assist the Committee in its advisory capacity.
- D. The Committee may provide advice to the Commissioner regarding the implementation and administration of this section, and may provide the Commissioner with a biannual review of the dairy industry.

IV. Monthly Reporting Schedules

- A. Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month, commencing with the month of May, for the reporting month of April.
- B. The Monthly Reporting Schedule shall be a form provided by the Department, which shall include, but not be limited to the following information:
 - (1) the amount, in pounds, of Class I milk sold for consumption in Massachusetts during the past month, not including sales to another Massachusetts licensed dealer;
 - (2) the amount, in pounds, of fluid milk received from each Massachusetts producer during the past month.
 - (3) the amount owed to the Fund as calculated according to the formula in paragraph V of this Order.

- C. Every Massachusetts producer who holds a valid certificate of registration, and does not ship milk to a milk dealer licensed by the Department, or to a co-operative, must provide the Department, by the twenty fifth day (25th) day of each month, a statement of the amount of milk produced and sold during the previous month and proof of such amount.

V. Pricing Order Fund

- A. Every dealer, as defined in this Order, is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts. In cases where the same milk is handled by more than one dealer, the dealer which is the final entity to handle said milk for wholesale or retail sale within the Commonwealth shall be deemed to be the dealer required to report such sales.
- B. In calculating the amount owed in paragraph IV. B.3. of this Order, the following formula shall be used:

- (1) Calculation of the Order Premium

$$\frac{15.00 - \text{Blend}}{3} = \text{Order Premium}$$

where,

Blend = The blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 price for the second preceding month (i.e.: for the reporting month of April, use February Blend), plus any state mandated premium.

(2) Calculation of the Premium Payment

Order Premium \times Amount sold for Class I utilization, calculated in paragraph IV. B. (1) = Premium Payment.

VI. Order Distributions

A. The Commissioner shall direct that monthly distributions from the Fund are made by the fifth (5) day of each month, commencing with the month of June, in the following manner:

- (1) Payment shall be made directly to every Massachusetts producer based upon their proportion of milk produced in Massachusetts according to the following formula:

$$A/E = W$$

$$F \times W = \text{amount distributed to Massachusetts producer}$$

where,

A = amount, in pounds, produced by the producer for the reporting month, except that in no case shall the amount in "A" exceed two hundred thousand (200,000) pounds.

E = the total monthly sum, in pounds, of milk produced in Massachusetts.

W = proportion of producer's contribution to Massachusetts milk production.

F = amount, in dollars, in the Order fund for the reporting month.

- (2) In no case shall the distribution to the producer exceed the figure determined in (3) below.
- (3) The maximum distribution to the producer shall be determined by according to the following formula:

$$\$15.00 - \text{Blend} = T$$

$T \times A =$ maximum amount which can be distributed to the Massachusetts producer.

Blend = the blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 for the second second preceding month.

T = Target Differential

A = amount, in pounds, produced by the producer except that in no case shall this figure exceed two hundred thousand pounds.

B. All amounts received pursuant to this Order shall be distributed by the Commissioner for the purposes of this Order only and all amounts shall be distributed directly to Massachusetts producers, except those amounts returned to the licensed dealers in accordance with paragraph C, below.

C. After the Order amount has been distributed to every Massachusetts producer, the Commissioner shall direct that the remaining balance be distributed directly to the licensed dealers, based upon each dealer's proportionate contribution to the total fund on or before the fifth (5) day of the month.

D. Adjustments:

1. Whenever verification of reports or payments of any dealer discloses errors made in payments to or from the Fund, the Department shall promptly notify such dealer of any unpaid amount, and such dealer shall, within five (5) days, make payment of the amount so billed. Whenever verification discloses that payment is due from the Fund to any dealer, the Commissioner shall, as promptly as possible, direct that such payment be made.
2. Whenever the Commissioner is required to make payments to a dealer pursuant to the provisions of this Order, and any amount is due from the dealer to the Fund for the same payment period, the Commissioner may issue a credit to the dealer for the amount of the payment in lieu of the payment in order to balance the amounts owed.

VII. Enforcement

- A. In the event that a producer or milk dealer provides false information or attempts to misrepresent information required pursuant to this section, or fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted.

- B. Any person found in violation of any provision of this Order shall be subject to civil or criminal penalties pursuant to M.G.L. c. 94A section 22.

VIII. Miscellaneous Provisions

- A. Continuing Obligation of Dealers: Unless otherwise provided by the Commissioner upon termination of any or all of the provisions of this Order, such termination shall not:
 - (1) Affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provisions of this order;
 - (2) Release or waive a violation of this Order occurring prior to the effective date of termination;
 - (3) Affect or impair any right or remedy of the Commissioner or of any other person with respect to any such violations.
- B. No dealer, including stores, shall unconscionably increase the price charged for Class I milk. The Commissioner shall continue to monitor the pricing structure of milk sold for Class I consumption within the state to determine if they are unconscionably excessive in response to this Order. Upon a determination by the Commissioner that any price is unconscionable, the Commissioner shall provide the dealer with an opportunity for a hearing in accordance with M.G.L. c. 94A section 6, and take appropriate action in accordance with said section.

- C. Continuing Power and Duty: If, upon termination of this Order, or any part thereof, there are any obligations arising hereunder, the final accrual or ascertainment of which require further acts by any dealer or by the Commissioner, the power and duty to perform such further acts shall continue.
- D. Liquidation: Upon the termination or suspension of this Order, the Commissioner shall dispose of all funds received pursuant to the provisions of this Order, in an equitable manner, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

IX. Effective Dates

This Order is implemented pursuant to the emergency provisions of M.G.L. c. 94A and M.G.L. c. 30A section 2 and is effective immediately. The first Monthly Reporting Schedule shall be due by May 25th, 1992 for the reporting month of April 1992.

The provisions of this section shall cease to be in effect in the event that price setting is established pursuant to an interstate dairy compact, approved by Congress.

Signed this
26th day of
February, 1992

GREGORY C. WATSON
COMMISSIONER

This Order amends the Pricing Order dated February 18, 1991, for technical, clarification purposes.

MONTHLY REPORTING SCHEDULE 1992 PRICING ORDER MAY 1992

Pursuant to the 1992 Pricing Order issued by the Commissioner of Food and Agriculture under the authority of M.G.L. Chapter 94A, sections 10, 11 and 12, all milk dealers including collective cooperatives are required to submit a completed Monthly Reporting Schedule on or before the twenty-fifth of each month. In order to comply with the Order, every licensed milk dealer and collecting cooperative must complete and submit this form along with the appropriate payment by the 25th of each month.

DEALER: West Lynn Creamery, Inc.

ADDRESS: 626 Lynnway, Lynn, MA 01905

REPORT FOR MAY 1992

<u>MILK RECEIPTS FOR MAY 1992</u>	<u>HUNDREDWEIGHT</u>
1. Receipts from Massachusetts Producers	<u>5,214</u>
2. Receipts from Non-Massachusetts Producers	<u>225,684</u>
3. Receipts from Cooperatives	<u>24,121</u>
4. Transfers or Receipts of Bulk OR Packaged Milk	<u>973</u>
5. Own Production	<u>0</u>
6. TOTAL RECEIPTS	<u>255,992</u>

CLASS I MILK SALES FOR MAY 1992

All Milk dealers are required to report the initial sale in Massachusetts of Class 1 milk.

7. Class I Milk Sold Retail & Wholesale in Massachusetts	<u>114,900</u>
8. Class I Milk Sold Out of Massachusetts	<u>60,576</u>
9. Class I Milk Sold to Other Milk Dealers	<u>17,488</u>
10. Total Class I Milk Sales	<u>192,964</u>

JA42

AMOUNT SOLD TO OTHER MILK DEALERS

11. For sales to other Massachusetts dealers (#9 from page 1), attach a list of the dealer's name and the amount sold to each dealer during May 1992.

PURCHASES OF MILK FROM MASSACHUSETTS PRODUCERS

12. For receipts from Massachusetts producers (#1 from page 1), attach a list of the producers' names and the amount purchased from each during May 1992.

13. Number of Massachusetts Producers 6

CALCULATIONS

STEP 1: \$15.00 minus March's Zone 21 blend price (\$12.20) =
\$ 2.80

STEP 2: Divide the amount
in STEP 1 by 3 = \$.933

STEP 3: Multiply the amount from STEP 2
by your total Massachusetts Class 1 milk sales
as reported in #7 on page 1 = \$ 107,201.70

For the amount calculated in STEP 3 include with this completed form a check payable to:

Massachusetts Dairy Equalization Fund

This completed form, the May 1992 Federal Market Administrator's Form No. 1, and a copy of the Federal Market Administrator's computer generated "Receipts and Utilization" (where applicable) must be received by the Department no later than June 25, 1992.

Mail To: Bureau of Milk Marketing
Department of Food and Agriculture
100 Cambridge Street, 21st Floor
Boston, MA 02202

JA43

I, the undersigned, hereby declare under the penalties of perjury as provided in M.G.L. c. 268, section 1A that the information given in this report is true to the best of my knowledge and belief. Any person providing false information is subject to license suspension/revocation pursuant to M.G.L. c. 94A, section 6.

SS. Number of Federal I.D. Number _____

Authorized Signature Date

Title

If there are questions on the completion of this form or requirements of the 1992 Pricing Order, please contact the Department of Food and Agriculture at 617-727-3020 x 140 or 138.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL ACTION NO. 92-4610

WEST LYNN CREAMERY, INC.
and LeCOMTE'S DAIRY, INC.

Plaintiffs,

v.

GREGORY WATSON,
COMMISSIONER, Massachusetts
Department of Food and
Agriculture,
Defendant.

COMPLAINT

INTRODUCTORY STATEMENT

1. This is a civil action challenging the enforcement of a 1992 "Pricing Order," issued by Gregory Watson, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner"). The action is brought by West Lynn Creamery, Inc. and LeComte's Dairy, Inc. under 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution (Article I, § 8, cl. 3). The basis for this action is that the Commissioner's 1992 Pricing Order, as applied to the plaintiffs, burdens interstate commerce by requiring the plaintiffs to pay funds to Massachusetts milk farmers while out-of-state farmers, the principal source of milk in Massachusetts, receive no funds.

PARTIES

2. The plaintiff, West Lynn Creamery, Inc. ("West Lynn") is a Massachusetts corporation with a principal place of business in Lynn, Massachusetts. West Lynn is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. c. 94A, to sell milk in the Commonwealth of Massachusetts. West Lynn purchases raw milk from producers (dairy farmers) and producer-cooperatives. It then processes and packages milk in its processing plant and sells in Massachusetts approximately 60% of the milk it purchases.

3. The plaintiff, LeComte's Dairy, Inc. ("LeComte's") is a Massachusetts corporation with a principal place of business in Somerset, Massachusetts. LeComte's sells milk and related dairy products to various retailers, convenience stores, nursing homes, restaurants, etc. It purchases one hundred (100%) percent of its fluid milk products from West Lynn. LeComte's is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. c. 94A, to sell milk in the Commonwealth of Massachusetts.

4. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, *inter alia*, with the regulation of the milk industry in Massachusetts under the provisions of M.G.L. c. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

STATEMENT OF THE CASE

A. BACKGROUND — THE INTERSTATE NATURE OF COMMERCE IN, AND FEDERAL REGULATION OF, FLUID MILK IN THE NEW ENGLAND STATES

5. The dairy industry in the Northeastern United States, including New England, is characterized by substantial interstate movement of fluid milk, both from the dairy farm to the processing/bottling plant, and from the plant to the ultimate consumer. Throughout most of New England (and, indeed, throughout most of the United States), the minimum prices which fluid milk processors ("handlers") must pay to dairy farmers ("producers") or associations of dairy farmers "cooperatives"), are established by federal milk marketing orders promulgated by the United States Secretary of Agriculture (the "Secretary") pursuant to the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601, *et seq.*, as amended.

6. The Secretary has issued and enforced for many years one milk marketing order for virtually all of New England — the "New England Federal Milk Marketing Order No. 1" ("Order No. 1"). The Order No. 1 marketing area includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire.

7. West Lynn is a "handler" regulated by Order No. 1. Accordingly, the minimum payments received by producers or cooperatives supplying milk to West Lynn are determined by the provisions of Order No. 1.

8. The pattern of unitary federal minimum producer price regulation reflects the interstate nature of commerce in the milk industry throughout New England. Of the six New England states, only the two most sparsely populated — Vermont and Maine — are "export states," *i.e.*, dairy farmers within those two states produce far more milk than is consumed therein. This excess milk production is exported across state

lines and sold to handlers who package milk for consumers in the more densely populated New England states. Moreover, a substantial portion of the milk sold to consumers in New England is produced on dairy farms located in the State of New York.

9. According to the statistics published by the New England Federal Order Market Administrator, during the year 1991 about 72% of the producer milk received by handlers regulated under Order No. 1 was produced on farms located in Vermont and New York, and a mere 7.8% was produced on Massachusetts dairy farms.

10. Because the Commonwealth of Massachusetts contains about 40% of the population within the geographical coverage of Order No. 1, the Commonwealth is a decidedly import state — nearly 90% of the milk sold in Massachusetts is produced on dairy farms located within other states (primarily Vermont and New York).

11. Beginning in 1933, several states in the Northeast, led by New York, attempted to remedy the perceived problem of inadequate returns to their local dairy farmers through the enactment of state milk control laws.

12. To the extent that those state enactments impinged upon interstate commerce (*e.g.*, by attempting to insulate in-state farmers or dealers from competition with lower-priced out-of-state milk), the regulations have been held to violate the Commerce Clause. *E.g.*, *Baldwin v. Seelig*, 294 U.S. 511 (1935).

B. THE COMMISSIONER'S 1992 PRICING ORDER

13. On January 28, 1992, the Commissioner, citing the Milk Control Law (M.G.L. c. 94A, § 12), declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a pricing order on February 18, 1992, which was amended on February

26, 1992 (the "Pricing Order"). A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.

14. The Pricing Order requires all licensed milk dealers doing business in Massachusetts, including the plaintiffs, whether located in or out of the Commonwealth, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a monthly basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.

15. The amounts paid into the Fund are then distributed monthly by the Commissioner *pro-rata* to Massachusetts dairy farmers *only*, notwithstanding that most of the milk purchased by West Lynn and sold to consumers in Massachusetts is imported from other states.

16. The Pricing Order issued by the Commissioner:

- (a) establishes a minimum price for raw milk sold in Massachusetts (regardless of where the raw milk is purchased) which is in excess of the minimum price established by the Secretary of Agriculture pursuant to Order No. 1;
- (b) has the same effect as a "customs duty" or "protective tariff" on the importation of milk produced in other states;
- (c) distributes the proceeds of the Fund to dairy farmers located in Massachusetts *only*;
- (d) subsidizes Massachusetts farmers which causes the disorderly marketing of milk; and
- (e) causes economic harm to out-of-state farmers and to the plaintiffs.

17. The Commissioner's Pricing Order is:

- (a) imposed upon the sale of *all* fluid milk sold to consumers in the Commonwealth; and
- (b) distributed among a very small percentage of the dairy farmers who produced that milk — only those dairy farmers located within the Commonwealth.

18. The Pricing Order requires all licensed milk dealers to file a monthly report and, at the same time, to make the payment into the Fund on or before the 25th day of each month, beginning May 25, 1992, based upon the previous month's Class I milk sales in Massachusetts.

19. The Pricing Order also requires the Commissioner to distribute all monies paid into the Fund to Massachusetts milk producers not later than the fifth day of the following month.

C. IMPLEMENTATION OF THE PRICING ORDER

20. As a result of the express terms of the Pricing Order, the Commissioner has attempted to exact from the plaintiffs, and will continue to exact, an assessment on all of the milk they sell in Massachusetts, although most of this milk is imported as raw milk from other states.

21. Pursuant to the express terms of the Pricing Order, the total annual assessment against West Lynn will amount to more than \$1 million, all of which is to be distributed only to Massachusetts producers despite the fact that 97% of the milk purchased by West Lynn is produced by out-of-state farmers.

22. West Lynn paid \$80,571.85 into the Fund on or about May 25, 1992 for the April Assessment. LeComte's paid \$3,195.54 for its April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.

23. On June 25, 1992, the Commissioner determined that West Lynn was required to make the "assessment" payment for the month of May pursuant to the Pricing Order. West Lynn objected to making payment and asserted that the Pricing Order burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

24. Realizing the practical impossibility of recovering any payments already exacted by the Commissioner and paid over to individual Massachusetts dairy farmers, West Lynn submitted its June 25, 1992 Report, but did not make payment to the Commissioner.

25. West Lynn then requested the Commissioner to put funds it would pay under the Pricing Order into an escrow account until the Constitutionality of the Pricing Order could be determined.

26. On June 26, 1992 the Commissioner issued a Notice of Hearing, addressed to West Lynn, to suspend or revoke West Lynn's milk dealer's license by reason of its failure to make the June 25, 1992 payments under the Pricing Order. No specific date has been set for that hearing.

27. On July 1, 1992, the Commissioner, despite West Lynn's Constitutional objections, ordered West Lynn to make the May payment immediately or he would hold a hearing on the next day which could result in the suspension or revocation of West Lynn's license to sell milk. The Commissioner also decided that the funds from the May payment would not be held in escrow, but would be deposited into the Fund.

28. On July 2, 1992, West Lynn, under protest, made payment to the Commissioner in the amount of \$107,201.70 for the May assessment. On June 29, 1992, LeComte's, under protest, made payment to the Commissioner in the amount of \$4,248.63 for the May assessment.

29. Upon information and belief, the Commissioner disbursed LeComte's \$4,248.63 amongst 418 Massachusetts farmers on or about July 5, 1992 and West Lynn's \$107,201.70 payment on or about July 15, 1992.

D. THE NEED FOR INJUNCTIVE RELIEF

30. The Commissioner has threatened to impose penalties, including suspension or revocation of the milk dealer's licenses of West Lynn and other dairies, if they do not make payments into the Fund on a timely basis pursuant to the Pricing Order.

31. Under Massachusetts law, all persons engaged in the business of purchasing milk from producers, and otherwise handling milk within the Commonwealth, must hold a milk dealer's license, which licenses are issued by the Commissioner annually. It is a violation of M.G.L. c. 94A to sell milk without a valid milk dealer's license.

32. Irreparable harm will result to the plaintiffs if the Commissioner is permitted to continue to disburse payments from the Fund to Massachusetts dairy farmers in accordance with the Pricing Order:

- (a) it does not appear that there is a practical remedy for recovering those monies paid by the plaintiffs from either the Commissioner or the 418 individual Massachusetts dairy farmers once those funds are disbursed; and
- (b) out-of-state farmers will suffer economic harm if they are placed at a competitive disadvantage, which will result if the Commissioner continues to subsidize Massachusetts farmers while not subsidizing out-of-state farmers.

33. Enjoining the Commissioner from enforcing the Pricing Order, from penalizing the plaintiffs, or from suspending or revoking the plaintiffs' milk dealer's licenses is in the interest of consumers, out-of-state farmers and the public interest.

34. Any harm to the Commissioner as a result of the issuance of an injunction on the terms requested is outweighed by the irreparable harm to the plaintiffs if their licenses to sell milk are suspended or revoked, or if monies are disbursed from the Fund.

COUNT I—VIOLATION OF THE COMMERCE CLAUSE

35. The plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 34.

36. The enforcement of the Pricing Order as to the plaintiffs, the exaction of the payments under the Pricing Order from the plaintiffs, and the disbursement of funds to Massachusetts farmers but not out-of-state farmers, constitute a discriminatory, unreasonable and impermissible burden upon interstate commerce.

37. The Pricing Order places out-of-state farmers at a competitive disadvantage because it subsidizes Massachusetts farmers, but not out-of-state farmers, all of whom are selling milk in Massachusetts. Subsidizing Massachusetts farmers, but not out-of-state farmers who compete with Massachusetts farmers, will cause economic harm to out-of-state farmers. The payments by the Commissioner from the Fund to Massachusetts farmers have the same effect as a tariff on out-of-state farmers.

38. Out-of-state farmers may be forced out of business due to the unfair competitive advantage provided to Massachusetts producers as a result of the Commissioner's enforcement of the Pricing Order.

39. Enforcement of the Pricing Order violates the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

40. Enforcement of the Pricing Order and the Commissioner's actions pursuant to the Pricing Order constitute the deprivation, under color of state law, of rights guaranteed to the plaintiffs under the United States Constitution, particularly the Commerce Clause and 42 U.S.C. § 1983.

41. As a result of the Commissioner's actions, the plaintiffs have been and will be damaged.

COUNT II – DECLARATORY JUDGMENT

42. The plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 41.

43. As set forth above, the Commissioner, acting under color of state law, has deprived and will deprive the plaintiffs of rights, privileges or immunities secured by the United States Constitution by virtue of his application of the Pricing Order to the plaintiffs.

44. An actual controversy exists as to whether the application of the Pricing Order constitutes a violation of the Commerce Clause of the United States Constitution, as well as 42 U.S.C. § 1983.

45. Declaratory relief, pursuant to M.G.L. c. 231A, is appropriate and proper.

RELIEF REQUESTED

WHEREFORE, the plaintiffs request the following relief:

(1) A declaratory judgment pursuant to M.G.L. c. 231A that the Commissioner's enforcement of the Pricing Order as applied to the plaintiffs violates 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution under Count I.

(2) A preliminary injunction enjoining the Commissioner from:

(a) attempting to collect from West Lynn and LeComte's the so-called "equalization" assessments provided for under the Commissioner's Amended Pricing Order, dated February 26, 1992; and

(b) imposing any penalty, including, but not limited to, suspending or revoking West Lynn's or LeComte's milk dealer's licenses due to their failure to pay the so-called

"equalization" assessments, provided for under the Commissioner's Amended Pricing Order, dated February 26, 1992.

(3) A permanent injunction:

- (a) making the terms of the preliminary injunction permanent; and
- (b) enjoining the Commissioner from disbursing any money paid into the Massachusetts Dairy Equalization Fund established pursuant to the Commissioner's Amended Pricing Order, dated February 26, 1992.

(4) For damages pursuant to 42 U.S.C. § 1983 in an amount that this Court may determine after a trial on the merits.

(5) For reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

(6) For a Short Order of Notice ordering the Commissioner to show cause why the second prayer of relief, set forth above, should not be granted.

(7) For such other and further relief as this Court may deem just and appropriate.

**WEST LYNN CREAMERY, INC. and
LeCOMTE'S DAIRY, INC.**

By their attorneys,

Michael L. Altman
BBO #016800
Margaret A. Robbins
BBO #559920
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

Dated: July 24, 1992

EXCERPTS FROM
RECORD OF PROCEEDINGS
BEFORE THE
COMMISSIONER RE;
WEST LYNN CREAMERY, INC.

VOL. I
PAGES 1-102
EXHIBITS See Index

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE

RE: WEST LYNN CREAMERY, INC.
Administrative Docket No. MD-9347

BEFORE: Gregory C. Watson, Commissioner

Dept. of Food & Agriculture
100 Cambridge Street
Boston, Massachusetts
Monday, September 14, 1992
1:20 p.m.

APPEARANCES:

James Hines, Director of Agricultural Development, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Tara Zadeh, General Counsel, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Rubin & Rudman (Michael L. Altman, Esq. and Margaret Robbins, Esq.), 50 Rowes Wharf, Boston, Massachusetts 02110, for West Lynn Creamery, Inc.

Also Present:

Arthur J. Pappathanasi

Walter J. Boverini

Edward J. Clancy

Nancy Young

Lucille Andrew

INDEX

EXHIBITS	PAGE
A Notice of Hearing	8
B Report and Recommendation dated May 20, 1992	9
C Pricing Order and Payment Order	12
D Petition and Affidavit	13
E Finding and Declaration of State of Emergency	14
F Amended Pricing Order	15
G Monthly Report for June 1992	38
H Monthly Report for April and May 1992	38

EXHIBITS	PAGE
I Letter dated June 23, 1992 and attachments.	38
J Monthly Report for May 1992.	39
K Letter dated August 31, 1992 and attachments.	49
L Letter dated September 1, 1992 and attachments.	52
AA Affidavit of Dr. Ronald D. Knutson.	62
BB Brief.	63
CC Affidavit of Arthur Pappathanasi.	66
DD Average Milk Prices per Hundredweight from January to June 1992.	89
EE Data from Mass. Dept. of Agriculture Provided Pursuant to General Laws Chapter 66, Section 10.	92

* * *

[p. 413] MR. WATSON: And the issue being the delayed payment and the failure to pay?

MR. HINES: The delayed payment and failure to pay in violation of the program. I also want to bring up —

MR. ALTMAN: Wait, wait, wait Violation of the program? My understanding is the only violations are the fact that we paid the June 25th payment on July 2nd. We will stipulate to that. And we've told Mr. Hines and we've told the Commissioner the reason we didn't pay is because we believe that the order violates the Commerce clause of the United States Constitution, and that it would be illegal to compel us to pay it.

The same comment goes for the payment that was due on July 25th and for August 25th. We acknowledge — There's no dispute we didn't pay it. We've offered to put it in escrow, and that's been rejected, but we didn't pay it. That's why we're here, right?

* * *

[p. 441] MR. ALTMAN: Well, the policy of the Department is to distribute 100 percent of the funds that are paid into the equalization fund pursuant to the pricing order.

MR. HINES: That is correct.

MR. ALTMAN: And certainly in the first few months, that's what has been done.

MR. HINES: That is correct. The policy is to pay and then to rebate any amounts left over — once the requirement is met — back to the individual dealers.

* * *

[p. 445] And what's happened is with this pricing order going into effect, we attempted to pass on these costs. We're not going to hide the fact that we attempted to pass it on to all our customers. But the facts in the marketplace is that it's very, very [p. 446] competitive out there, and I think if you called in every other dairy in the industry for testimony on this, I think they'd bear me out.

That every month we are giving up some of that tax that we're passing on, and we see our margins eroding. If you look in the month of March, we have margins of a certain amount of sets per unit. We can supply you with this information. In April those margins began to deteriorate slightly per unit. In May they deteriorated more. In June they deteriorated more. In July they deteriorated some more.

So at the present time we've absorbed roughly 50 percent of that tax that is being assessed. So at the present time it's costing us anywhere between \$30,000 and \$50,000 a month out of our margins and our profits to fund this tax payment.

MR. WATSON: Is that because you're holding it in escrow?

MR. PAPPATHANASI: No. What I'm saying is that we are only collecting from our customers only 50 percent of the

money at this time. We're putting in escrow 100 percent of the money. So 50 percent of the money is money we've received from customers. The other 50 percent is money we're receiving that we're putting in right out of our own profits.

* * *

[p. 448] MR. ALTMAN: Do I understand you purchase 98 percent of the milk that you sell in Massachusetts from out-of-state farmers, is that correct?

MR. PAPPATHANASI: That's correct, yes.

MR. ALTMAN: And some other dairies that you compete with purchase higher percentages from Massachusetts dairies, is that correct?

MR. PAPPATHANASI: That's correct, yes.

MR. ALTMAN: So you see, I mean when you talk about competitive advantages and disadvantages, Massachusetts farmers are getting \$15 hundredweight whereas New York and Vermont farmers are not, and so this is hurting West Lynn Creamery which is purchasing from out-of-state dairies in their efforts to compete with dairies who get a greater percentage of their milk from in-state, and that also in part explains why some

* * *

[p. 458] MR. ALTMAN: I have two other documents that I want to give you.

MR. WATSON: Okay.

MR. ALTMAN: This also is I believe attached to the memorandum. We're at what, Exhibit DD?

MS. ZADEH: Yes.

MR. WATSON: DD.

(Average Milk Prices Per Hundredweight from January to June 1992 was marked Exhibit DD.)

JA60

MR. ALTMAN: Basically I had this document put together based on data from the New [p. 459] England Agricultural Statistics Service.

* * *

[p. 460] MR. HINES: The column 1, the average price received by Massachusetts farmers, for example in July you're saying \$16.70. Are you taking into consideration the blend price or taking into consideration Class I?

MR. ALTMAN: That's the New England Agricultural Statistics Service, and if you want to call them you can verify these numbers. They compile from the farmers information on how much they are being paid for milk, and that's the reported price that was made available from that service. That's all I can say.

MR. WATSON: So we don't know if it's blend or Class I. Okay. We'll note that for the record.

MR. PAPPATHANASI: Ours is blend, column 2.

MR. WATSON: Clearly the West Lynn, column 2, is blend.

MR. PAPPATHANASI: Yes.

MR. WATSON: And there is clearly zone 1 [p. 461] blend price. But it's not clear as whether or not the average price received by Mass. farmers, column 1, refers to the blend or the Class I price. So we'll just note that.

MR. ALTMAN: It refers to the price that they received.

MR. PAPPATHANASI: Which would be blend.

MR. ALTMAN: There's only one price that they received for raw milk.

MR. PAPPATHANASI: They receive the blend. They don't receive the Class I.

MR. ALTMAN: I mean, they're just paid for milk and then broken down afterwards into Class I, Class II, Class III.

JA61

* * *

MR. ALTMAN: So the final document is EE. There's an extra copy if you want to look at it.

MR. WATSON: Thanks.

(Data from Mass. Dept. of Agriculture Provided Pursuant to General Laws Chapter 66, Section 10, was marked Exhibit EE.)

MR. ALTMAN: And basically what this is is as follows. I made an FOI request, freedom of information request, to the Department to give me the [p. 462] information included on Exhibit EE, and what I was supplied with was that data.

* * *

The amount of milk produced in Massachusetts in April, May, and June; the amount of milk sold in Massachusetts in April, May, and June; the total paid to farmers in each of those months; and then I have the premiums that were paid out in four months. The Department hasn't yet given me the information for July to fill in there.

EXCERPTS FROM
RECORD OF PROCEEDINGS
BEFORE THE COMMISSIONER
RE: LECOMTE'S DAIRY, INC.

VOL. I
PAGES 1-20
EXHIBITS See Index

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE

RE: LECOMTE'S DAIRY
Administrative Docket No. MD-9346

BEFORE: Gregory C. Watson, Commissioner

Dept. of Food & Agriculture
100 Cambridge Street
Boston, Massachusetts
Monday, September 14, 1992
3:40 p.m.

APPEARANCES:

James Hines, Director of Agricultural Development, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Tara Zadeh, General Counsel, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Rubin & Rudman (Michael L. Altman, Esq. and Margaret Robbins, Esq.), 50 Rowes Wharf, Boston, Massachusetts 02110, for LeComte's Dairy.

Also Present:

Arthur J. Pappathanasi
Lucille Andrew

I N D E X

EXHIBITS	PAGE
B Report and Recommendation dated May 20, 1992.	—
C Pricing Order and Payment Order.	—
D Petition and Affidavit.	—
E Finding and Declaration of State of Emergency.	—
F Amended Pricing Order.	—
M Notice of Hearing.	8
N Monthly Report for June 1992.	12
O Monthly Report for July 1992.	12
P Monthly Report for May 1992.	13
FF Brief.	8

* * *

[p. 820] It is keeping those funds segregated. The only reason it didn't make the payments on June 25th and July 25th is that it believes on advice of counsel that the 1992 pricing order is a violation of the Constitution, the Commerce clause.

* * *

AFFIDAVIT OF ARTHUR J. PAPPATHANASI
SUBMITTED TO THE COMMISSIONER

Arthur J. Pappathanasi declares under the penalties of perjury that the following facts are true:

1. I am the President and Chief Executive Officer of West Lynn Creamery, Inc. ("West Lynn").

2. West Lynn did not make timely payment of the Assessment due on June 25, 1992 because West Lynn believed that the Pricing Order, as applied, is unconstitutional. On July 1, West Lynn paid the Assessment under protest and under threat of facing an immediate hearing to revoke its license.

3. West Lynn did not include payment with the July 25, 1992 report. West Lynn did not pay the assessment due on July 25, 1992 because West Lynn believed that the Pricing Order, as applied, is unconstitutional.

4. West Lynn has offered, and continues to offer, to pay all assessments into an escrow account to be held until the court determines whether the Pricing Order is unconstitutional. It is West Lynn's understanding that the Commissioner has refused to agree to the deposit of the assessments into an escrow account.

5. West Lynn stands ready, willing and able to pay all assessments that are finally determined to be constitutional by the courts.

6. A true copy of the Complaint, filed in the Suffolk Superior Court, challenging the constitutionality of the Pricing Order is attached to this Affidavit. Memoranda supporting West Lynn's claim that the Pricing Order is unconstitutional have been supplied to counsel for the Commissioner, Eric Smith, beginning in mid-July of 1992. Another Memorandum is being submitted with this Affidavit.

7. If the Commissioner were to suspend or revoke West Lynn's license to sell milk, this would have a serious effect on West Lynn. It is illegal to sell milk without a license. If

West Lynn were to sell milk without a license, it would be subject to criminal penalties. On the other hand, if West Lynn were to stop selling milk as a result of a license suspension or revocation, West Lynn would suffer a substantial economic loss and we would have to consider laying off hundreds of employees from their jobs. West Lynn sells milk to approximately 12,000 customers. These customers include school districts, nursing homes, restaurants, convenience stores, etc. If we could not sell milk to these thousands of customers, thousands of people would be harmed and the market would be substantially disrupted. If West Lynn could not sell milk, it would have to stop buying milk from farmers and this would harm those whom the Commissioner is attempting to economically assist.

8. Even a short suspension of West Lynn's license to sell milk would have disastrous consequences because customers depend upon a regular delivery of milk. To disrupt the delivery of milk for a short time has the potential to cause short term hardship for customers; it also could lead to the permanent loss of those customers who may prefer to do business with a dealer who has not had its licensing in jeopardy.

9. West Lynn believes that if it pays the assessments due into the Fund there is not a practical remedy for obtaining a return of the Funds from the Commissioner, the Commonwealth or the farmers.

10. Data supplied by the Commissioner's office shows that not more than 35 percent of the milk sold in Massachusetts is produced on Massachusetts farms. I believe that only about ten percent of the fluid milk sold in Massachusetts is produced on Massachusetts farms. West Lynn purchases about 98 percent of its milk from non-Massachusetts farmers — mostly from New York and Maine. Therefore, the burden of the Pricing Order falls disproportionately on West Lynn and its producers. Those producers compete with Massachusetts farmers and they

can't compete effectively against Massachusetts farmers who are receiving thousands of dollars under the Pricing Order.

11. I have reviewed West Lynn's prices and sales for the past two years. My conclusion is that the Pricing Order is seriously eroding profits. Moreover, while initially West Lynn attempted to pass on most of the Pricing Order to its customers, the market has made it impossible to do so. I estimate that we have only been able to pass on one-third to one-half of the Pricing Order to our customers.

**SIGNED UNDER THE PENALTIES OF PERJURY THIS
3RD DAY OF SEPTEMBER, 1992.**

Arthur J. Pappathanasi

**AFFIDAVIT OF DR. RONALD D. KNUTSON
REGARDING IMPACTS OF MILK TAX
ON INTERSTATE COMMERCE**

The purpose of this affidavit is to evaluate the impact of the 1992 milk "Pricing Order" on interstate commerce. I understand that the "Pricing Order" was issued by the Commissioner of the Massachusetts Department of Food and Agriculture. I have studied the content of the "Pricing Order" as issued on February 26, 1992, and the Findings and Declaration of Emergency that was issued by the Commissioner on January 28, 1992. In addition, I have studied data issued by the Department of Food and Agriculture as well as other data on the New England Federal Order Market as issued by the Federal Market Administrator. Specific data utilized to support particular conclusions are referenced throughout the affidavit.

My qualifications for addressing the issue of the impacts of the "Pricing Order" on interstate commerce arise from over 30 years of experience as a researcher in the economics of the dairy industry and government policy regarding agriculture, including the dairy industry.¹ Of specific relevance is my training in the field of agricultural economics at the University of Minnesota and at the Pennsylvania State University. During this training and subsequently in my research, I have studied the economic effects of what states have done to improve the position of their milk producers. It is because of the adverse effects of local intervention that we have institutions such as Federal Milk Marketing Orders.

In my current position as Director of the Agricultural and Food Policy Center at Texas A&M University, studies are regularly done upon the request of members of Congress for the purpose of analyzing the impacts of policy changes on the

¹ A copy of my resume is attached.

dairy industry as well as on other agricultural industries. Much of our research on the dairy industry has involved analyzing of the impacts of changes in dairy policy on the survival of dairy farms in different parts of the United States including the Northeast and New England.

There should be no doubt that dairy farms in the Northeast are in an intense competitive struggle. In fact, the whole dairy industry is undergoing competitive forces that are precipitating momentous structural change toward fewer but larger dairies. During the late 1980s, milk producers in Massachusetts found themselves in a difficult competitive situation while land values were increasing at double digit rates.² With relatively tight margins many farmers decided to sell their dairy farms. When land prices leveled out and declined in 1989-1992, farmer exits slowed greatly. There was no longer as strong an incentive to sell. Yet the competitive pressure on milk producers continued. That pressure is toward large scale dairies having 200 or more milking cows — in California and Western New York, the number is 500 cows or more. The average size of dairy herds in Massachusetts, based on Federal Order Market Administrator data, is about 70 cows.³ Further consolidation of farm operations is inevitable over the long run regardless of what the Commonwealth of Massachusetts does in terms of short-run policy. Economic recovery will once again provide the incentives for consolidation and exit from dairy farming.

From a practical perspective, it should not make any difference to any nonresident if Massachusetts wants to tax its citi-

² World Agricultural Outlook Board, "Agricultural Resources: Agricultural Land Values," *Situation and Outlook Summary*, (Washington, D.C.: Economic Research Service/USDA, April 22, 1992), pp. 3-4. Fred Cale and David Henderson, *Estimating Entry and Exit of U.S. Farms*, Staff Report AGES 9119, (Washington, D.C.: Economic Research Service/USDA, March 1991).

³ Market Administrator, *New England Milk Market Statistics for the Year 1991*, (Boston, MA: Federal Order No. 1, 1992), pp. 4-6. Assumes an output per cow of 15,000 pounds which approximates the Massachusetts average.

zens for the purpose of protecting its milk producers as long as no one else is injured. However, in this case the pricing order causes economic harm to milk producers who operate in other states, to Massachusetts milk processors,⁴ and to consumers. All of these injuries are directly related to interference with interstate movement of milk and its products at competitive prices. The remainder of this affidavit explains the nature and extent of that injury.

Producer Injury

Injury to producers located outside Massachusetts results from interference with interstate movement of milk in four respects:

- The milk out-of-state producers sell in interstate commerce to Massachusetts processors who, in turn, sell to Massachusetts retailers and consumers was taxed⁵ at an average rate of \$0.66/cwt in April 1992, \$0.93/cwt in May 1992, and \$0.74/cwt in June 1992. The effect of this tax has been to reduce the flow of raw (producer) milk into Massachusetts because the retail price increase to consumers reduces the demand for milk. In other words, as local (Massachusetts) demand for milk decreases, a larger proportion of the out-of-state milk that would have been imported into Massachusetts for fluid use is diverted to manufacturing plants located in proximity to where the milk is produced. As this happens, the blend price received by producers falls. While Massachusetts producers tend to be shielded from this blend price decline by the tax, out-of-state producers have no shield. Their blend price falls.

⁴The term "processor" as used in this affidavit refers to milk dealers as that term is defined in the 1992 Pricing Order.

⁵The terms tax or taxed are used in this affidavit to refer to the assessments imposed by the Commissioner.

Prior to the imposition of the tax, the retail price of milk in Massachusetts generally ranged from about \$1.99 per gallon to \$2.49 per gallon. Based on a retail milk price of \$2.29/gallon, consumption of milk in Massachusetts declined by 970,413 pounds in April; 1,382,386 pounds in May; and 1,066,539 pounds in June from the level of consumption that would have existed in the absence of the tax. Appendix A indicates the details of the computational procedures. Appendix B indicates the impacts on demand of consumer price levels ranging from \$1.99-2.49 per gallon in \$0.10 per gallon increments. The same procedures are utilized in arriving at these demand impacts as in Appendix A. Over the three month period, based on a retail price of \$2.29 per gallon, 3,419,338 pounds of milk were displaced from interstate commerce by virtue of the higher consumer price alone (Table 1). This occurs because Massachusetts processors cannot sell as much milk at the higher price. If these pricing conditions existed throughout the year, 13.7 million pounds of milk would be displaced from interstate commerce due to the higher price. The displacement of out-of-state milk from interstate commerce occurs because of the preference given to locally produced milk due to lower transportation costs and the unwillingness of processors to receive any more milk than is needed.

- The second source of injury to out-of-state producers occurs because Massachusetts producers will increase milk production in response to the higher milk price. This increased production displaces milk that would otherwise be sold to Massachusetts processors by out-of-state producers. In contrast with milk consumers who immediately reduce consumption in response to a higher price, milk producers respond over a longer time frame. Economists normally analyze producer response over a short-run period of a year and a long-run period of three years or more.

Extensive research on the supply response of milk producers indicates that, in the short run, for each 1 percent increase in the price of milk, production increases by 0.30 percent. This same research indicates that in the long run a 1 percent increase in the price of milk increases production by 1 percent. The reason for the difference in responsiveness is that it generally takes a period of about three years for farmers to add cows to their herds.

As in the case of the demand impacts, Appendix A also indicates the computational procedures for determining the supply impacts for each month, April-June 1992. Appendix C summarizes the increases in supply that would be expected for each month if extended over the respective short-run and long-run time periods. It is not appropriate to sum these responses as in the case of demand; rather they need to be averaged. This assumes that roughly the same average magnitude of tax would exist over the period of a year.^a Under this assumption, milk production in Massachusetts would increase by 1,751,939 pounds in the short-run. If this tax were maintained over the long-run, Massachusetts producers would respond by increasing milk production by 5,838,446 pounds.

It may be concluded that on an annual basis, the reduced flow of milk in interstate commerce would total 13.7 million pounds due to reduced demand, plus 1.8 million pounds due to increased supply, or 15.5 million pounds in total. By all standards, this represents a substantial quantity of milk and would be even larger extended over a longer time period.

- The third source of adverse injury to producers results from the potential for the Massachusetts milk tax to undermine the premiums paid by processors to producers located in states other than Massachusetts. When the demand for Massachusetts

^a While milk prices are quite cyclical, the months of April-June are likely to be quite representative of the annual average with typically higher market prices in September-December and lower prices in the late winter and early spring.

milk falls, or the supply increases, out-of-state milk handlers (cooperative or investor-owned) must find another home for this raw milk. The competition involved in finding that home for milk reduces the potential for obtaining premiums on milk sold by out-of-state producers. In other words, when milk is plentiful, it is more difficult to negotiate premiums, and the price of raw milk, therefore, falls. Of course, this decline in premiums is compounded by the decline in blend price received by out-of-state producers that results from the reduced demand for Class I milk and the increased utilization of milk for manufacturing uses.

- The fourth source of injury to producers results from out-of-state milk producers receiving a lower price for their milk than Massachusetts producers. The result is an inherent discrimination against out-of-state producers. As a result of not receiving the Massachusetts distribution of tax proceeds, out-of-state producers are placed at a disadvantage competing in the market for milk. Conversely, Massachusetts producers have an inherent advantage that gives them a competitive edge in a market that has been determined under the New England Federal Milk Marketing Order to be broader than Massachusetts.

Processor injury

Injury to Massachusetts processors results from economic effects and incentives built up by interference with the interstate movement of milk in three respects:

- As a result of the tax, a higher price is paid by processors for raw milk. Some of this higher price is being passed on to consumers who, as has been seen, react by purchasing less milk. The reduced sales increase the processors' unit costs of doing business. Many of the costs involved in processing milk are fixed. Reduced sales mean that those fixed costs cannot be spread over as large a volume. Thus unit processing and distribution costs rise.

● Processors are also adversely affected by distortions in their route structure and by increased competition for consumer sales from out-of-state sources of supply. It should not be a surprise to anyone that consumers buy milk on the basis of price. Since Massachusetts is a relatively small state, many of its consumers have access to milk from an adjoining state.

Just as Canadian consumers drive across the border to buy lower priced milk in the United States, Massachusetts consumers can be expected to do likewise. The result is the need for dealers to continuously adjust their route structure in response to shifting demand. Such adjustments are costly. Moreover, once the tax is abandoned, further adjustments will be required.

● Strong economic incentives are provided for Massachusetts buyers of processed milk at the wholesale level to purchase their milk needs from out-of-state processors at lower prices. In contrast with the past when there was a close longer-term working relationship between processors and wholesale buyers of milk, today milk is increasingly being sold on a spot sale basis — often in truckload lots but even in less than truckload lots. While this type of spot sale is occurring throughout the United States, the Massachusetts milk tax generates strong economic incentives for such spot sales. The out-of-state processor can make a one-time COD sale of milk at a favorable price (perhaps higher than could be obtained from its regular customers) and the Massachusetts buyer could purchase the milk at a lower price than from a Massachusetts processor who was required to pay the milk tax.

I have examined the sales of West Lynn Creamery and have found that these anticipated adverse impacts are apparent from their records during the months of April-July 1992, compared with a year earlier. Specifically, West Lynn's sales volume

has been substantially reduced during the months of April-August 1992 compared with the same months of 1991. Comparable reductions of the same magnitude were not experienced in January-March 1992. In other words, the gap in sales between comparable months of 1991 and 1992 appears to be widening.

Consumer Injury

The primary consumer impact is in the higher price that must be paid for Massachusetts milk. This impact falls the heaviest on the poorest families, particularly those having a large number of children. With the overall economic downturn, more unemployment, reduced hours worked and reduced incomes, questions can be raised regarding the logic in and justification for a milk tax.

Signed under the penalties of perjury this 3rd day of September, 1992.

Ronald D. Knutson

Table 1. Pounds of Milk Displaced From Interstate Commerce by Milk Tax, April 1992-June 1992

Pounds displaced by reduced demand

—April	970,413
—May	1,382,386
—June	<u>1,066,539</u>
Total reduced demand	3,419,338

Pounds displaced by increased supply

—Short-run ¹	1,751,939
—Long-run ²	5,838,446

¹ Impact assumes program operates over a one-year period.

² Impact assumes program operates over a three-year period.

Appendix A

Impact of Milk Processor Tax on Milk Demand and Supply
April 1992

Milk Demand

Milk sold in Massachusetts (cwt)	1,105,731.47
Tax Receipts	\$726,069.41
Average tax/cwt	\$0.66
Average tax/gallon	\$0.057
Assumed milk price	\$2.29
Percent milk price increase	2.49
Demand elasticity	-0.35
Percent reduction in demand	0.87
Pounds milk sold in Massachusetts	110,573,147.0
1-percent reduction in demand (1-0.0087)	0.9913
Pounds milk that would have been sold	111,543,560.0
Reduction in fluid milk sales (pounds)	970,413.0

Milk Supply

Milk produced in Massachusetts (cwt)	385,335.45
Tax distributed	\$727,337.00
Distribution/cwt	\$1.89
Price received by Massachusetts producers	\$15.80
Price received without distribution/cwt	\$13.91
Percent increase in Massachusetts price	13.59
Short-run supply elasticity	0.30
Short-run percent increase in production	4.08
Short-run increase in production	1,572,169.00
Long-run supply elasticity	1.0
Long-run percent increase in production	13.59
Long-run increase in production	5,236,709.0

JA78

Appendix A

Impact of Milk Processor Tax on Milk Demand and Supply
May 1992Milk Demand

Milk sold in Massachusetts (cwt)	1,119,283.74
Tax Receipts	\$1,043,856.00
Average tax/cwt	\$0.93
Average tax/gallon	\$0.080
Assumed milk price	\$2.29
Percent milk price increase	3.49
Demand elasticity	-0.35
Percent reduction in demand	1.22
Pounds milk sold in Massachusetts	111,928,374.0
1-percent reduction in demand (1-0.0122)	0.9878
Pounds milk that would have been sold	113,310,760.0
Reduction in fluid milk sales (pounds)	1,382,386.0

Milk Supply

Milk produced in Massachusetts (cwt)	399,684.39
Tax distributed	\$979,151.00
Distribution/cwt	\$2.45
Price received by Massachusetts producers	\$16.30
Price received without distribution/cwt	\$13.85
Percent increase in Massachusetts price	17.69
Short-run supply elasticity	0.30
Short-run percent increase in production	5.31
Short-run increase in production	1,122,324.00
Long-run supply elasticity	1.0
Long-run percent increase in production	17.69
Long-run increase in production	7,070,417.0

JA79

Appendix A

Impact of Milk Processor Tax on Milk Demand and Supply
June 1992Milk Demand

Milk sold in Massachusetts (cwt)	1,077,643.71
Tax Receipts	\$792,561.70
Average tax/cwt	\$0.74
Average tax/gallon	\$0.064
Assumed milk price	\$2.29
Percent milk price increase	2.79
Demand elasticity	-0.35
Percent reduction in demand	0.98
Pounds milk sold in Massachusetts	107,764,371.0
1-percent reduction in demand (1-0.0098)	0.9902
Pounds milk that would have been sold	108,830,910.0
Reduction in fluid milk sales (pounds)	1,066,539.0

Milk Supply

Milk produced in Massachusetts (cwt)	379,884.19
Tax distributed	\$754,134.00
Distribution/cwt	\$1.99
Price received by Massachusetts producers	\$16.50
Price received without distribution/cwt	\$14.51
Percent increase in Massachusetts price	13.71
Short-run supply elasticity	0.30
Short-run percent increase in production	4.11
Short-run increase in production	1,561,324.00
Long-run supply elasticity	1.0
Long-run percent increase in production	13.71
Long-run increase in production	5,208,212.00

JA80

Appendix B

Impact of the \$0.07 Per Gallon Milk Processor Tax on the Quantity of Milk Demanded Under Alternative Retail Milk Prices.¹

Milk Price	Milk Demand Reduction	
	Monthly	Annual
(dollars)	----- (pounds) -----	
1.99	1,369,840	16,438,080
2.09	1,302,230	15,626,760
2.19	1,245,950	14,951,400
2.29	1,189,730	14,276,760
2.39	1,144,790	13,737,480
2.49	1,088,660	13,063,920

¹ Based on assumed milk sales of 110,000,000 pounds of milk per month.

JA81

Appendix C

Pounds of Milk Displaced From Interstate Commerce by the Milk Tax, by Month.

April 1992

—Short-run displacement	
—Demand decrease	970,413
—Supply increase	<u>1,572,169</u>
—Total short-run displacement	2,542,582

—Long-run displacement	
—Demand decrease	970,413
—Supply increase	<u>5,236,709</u>
—Total long-run displacement	6,207,122

May 1992

—Short-run displacement	
—Demand decrease	1,382,386
—Supply increase	<u>2,122,324</u>
—Total short-run displacement	3,504,710

—Long-run displacement	
—Demand decrease	1,382,386
—Supply increase	<u>7,070,417</u>
—Total long-run displacement	8,452,803

June 1992

—Short-run displacement	
—Demand decrease	1,066,539
—Supply decrease	<u>1,561,324</u>
—Total short-run displacement	2,627,863

—Long-run displacement	
—Demand decrease	1,066,539
—Supply increase	<u>5,208,212</u>
—Total long-run displacement	6,274,751

JA82

**DATA FROM MASSACHUSETTS
DEPARTMENT OF AGRICULTURE
PROVIDED PURSUANT TO G.L. CH. 66, § 10**

<u>Month</u>	<u>Mass. Premium¹</u>	<u>Mass. Milk Produced²</u>	<u>Class I Sold/Mass.²</u>	<u>Total Paid To Farmers³</u>
April	\$2.14	38,533,545	110,573,147	\$727,337 ⁴
May	\$2.80	39,968,439	111,928,374	\$979,151 ⁵
June	\$2.48	37,988,419	107,764,371	\$754,134 ⁶
July	\$2.48			

¹ The difference between the Zone 21 blend price and \$15.00.

² Total Class I milk sold in Massachusetts as reported by Dealers on the Report forms filed with the Department.

³ Total amounts paid to Massachusetts farmers each month from Equalization Fund per the Pricing Order.

⁴ No rebate in April.

⁵ \$1,043,856 was received; the excess is to be rebated to Dealers per the Pricing Order.

⁶ \$792,561.70 was received; the difference between paid and received will be disbursed in the future.

JA83

**AVERAGE MILK PRICES PER HUNDREDWEIGHT
FROM JANUARY TO JUNE 1992**

<u>Month (1992)</u>	<u>Average Price Received by MA Farmers¹</u>	<u>Average Price Paid to Farmers by WLC²</u>	<u>Zone 1 Blend Price</u>
January	\$14.50	\$14.53	\$14.03
February	\$14.00	\$14.08	\$13.58
March	\$13.40	\$13.43	\$12.92
April	\$15.80	\$13.49	\$13.24
May	\$16.30	\$13.49	\$13.24
June	\$16.50	\$14.05	\$13.81
July	\$16.70	\$14.35	\$14.10

¹ Data from New England Agricultural Statistics Service. Includes Premium paid per the Pricing Order.

² Price is for raw milk; packaging not included. Includes premium for quality and quantity. Prices do not include hauling charges. Data supplied by West Lynn Creamery (WLC).

IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS:
MD-9202, MD-9301, MD-9347

Arthur Pappathanasi
President
West Lynn Creamery, Inc.
626 Lynnway
Lynn, MA 01905

DECISION

Re: Dealer Name: West Lynn Creamery, Inc.
Revocation of Milk Dealer License No: 191

INTRODUCTION

1. This decision is rendered after a full and fair hearing held in order to determine if there is cause to suspend or revoke the milk dealer's license of West Lynn Creamery, Incorporated. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that West Lynn Creamery, Inc., failed to comply with the Commissioner's Amended Pricing Order.

JURISDICTION

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

PARTIES

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Common-

wealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. West Lynn Creamery, Inc., (hereafter "West Lynn") is a company with a principal place of business located at 626 Lynnway, Lynn, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

FINDINGS

5. A show cause hearing was held on September 14, 1992 to determine whether there was sufficient cause to suspend or revoke West Lynn's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9347, MD-9301, and MD-9202 dated September 9, 1992, incorporating by reference the earlier notices received by West Lynn, was received by West Lynn on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including West Lynn.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On July 2, 1992, the Department received a May Monthly Reporting Schedule and required payment from West Lynn, due for the month of June. Pursuant to the Order, the May Monthly Reporting Schedule was due on June 25, 1992. West Lynn failed to attach the list of sales to other dealers and the May 1992 Federal Market Administrator's Form No. 1, as required by the Order.

13. On July 24, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992. West Lynn failed to attach the list of sales to other dealers and the June 1992 Federal Market Administrator's Form No. 1, as required by the Order.

14. On August 26, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992, however, the Department considered that the Schedule was timely filed.

15. On August 31, 1992, West Lynn submitted amended Reporting Forms for the months of June and July, as well as the May, June and July Federal Market Administrator's Form No. 1, as required.

16. As of the date of the hearing, West Lynn failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

17. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, West Lynn has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

18. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

19. West Lynn's failure to comply with the Order was a significant factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

20. West Lynn contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

21. The defense offered by West Lynn fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

22. It appears that West Lynn bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that West Lynn has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

23. West Lynn's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly de-

creased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums paid to out-of-state farmers to decline is not supported by the evidence.

24. West Lynn also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of West Lynn Creamery, Inc. is hereby revoked, effective on the fourteenth day following receipt of this decision, unless prior to that date West Lynn complies with the following:

- A. files a completed monthly reporting schedule and submits an accompanying payments for the month of July, 1992; and
- B. files completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(f).

EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON
COMMISSIONER

IN THE MATTER OF:

**ADMINISTRATIVE DOCKET NOS:
MD-9303 and MD-9346**

President
LeComtes/All Star Dairy, Inc.
PO Box 57/500 Wood Street
Somerset, MA 02726

DECISION

Re: Dealer Name: LeComtes/All Star Dairy, Inc.
Milk Dealer License No.: 114

INTRODUCTION

1. This decision is rendered after a hearing held in order to determine if there is cause to suspend or revoke LeComtes/All Star Dairy, Inc.'s milk dealer's license. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that LeComtes/All Star Dairy, Inc., failed to comply with the Commissioner's Amended Pricing Order.

JURISDICTION

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

PARTIES

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Commonwealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. LeComtes/All Start Dairy, Inc. (hereafter "Respondent") is a corporation which operates as a milk dealer, with a place of business in Somerset, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

FINDINGS

5. A show cause hearing was held on September 14, 1992 in order to determine whether there was sufficient cause to suspend or revoke Respondent's Massachusetts milk dealer's license.

6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9346 and MD-9303, dated September 9, 1992, incorporating by reference the earlier notices received by Respondent, was received by Respondent on September 9, 1992.

7. Based upon the testimony presented at the hearing, the following facts are found:

Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. c. 94A §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including Respondent.

10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

Violations

11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month . . .", following the monthly reporting period.

12. On June 29, 1992, the Department received a May Monthly Reporting Schedule, with the required payment, from Respondent, due for the month of May. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on June 25, 1992.

13. On July 25, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of June. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992.

14. On August 4, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of July. Pur-

suant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992.

15. As of the date of the hearing, Respondent failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.

16. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, Respondent has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).

17. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.

18. Respondent's failure to comply with the Order was a contributing factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

19. Respondent contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.

20. The defense offered by Respondent fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly

to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

21. It appears that Respondent bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that Respondent has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.

22. Respondent's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts' farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause

the premiums paid to out-of-state farmers to decline is not supported by the evidence.

23. Respondent also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

I. The milk dealer's license of LeComtes/All Star Dairy is hereby revoked, effective on the fourteenth day following receipt of this Decision, unless prior to that date Respondent complies with the following:

A. submits a completed monthly reporting schedule and submits an accompanying payment for the month of June and July, 1992; and

B. submits completely monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

All submissions are to be made during business hours at the offices of the Department of Food and Agriculture, Room 2103, 100 Cambridge Street, Boston, Massachusetts.

RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(7).

EFFECTIVE DATES AND PARTIES BOND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON
COMMISSIONER

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL ACTION NO. 92-6914

WEST LYNN CREAMERY, INC.,)
 Plaintiff,)
)
 v.)
)
 GREGORY WATSON, COMMISSIONER)
 Massachusetts Department)
 of Food and Agriculture,)
 Defendant.)

**PETITION FOR REVIEW OF COMMISSIONER OF
 MASSACHUSETTS DEPARTMENT OF FOOD
 AND AGRICULTURE'S DECISIONS**

Pursuant to M.G.L. ch. 94A, §§ 8 and 21, West Lynn Creamery, Inc. ("West Lynn") hereby petitions this Court to review the decision of the Commissioner of Food and Agriculture (the "Commissioner"), dated November 16, 1992, conditionally revoking West Lynn's milk dealer's license for failure to make "assessment" payments pursuant to the Commissioner's Amended Pricing Order (the "Pricing Order").

PARTIES

1. The plaintiff, West Lynn, is a Massachusetts corporation with a principal place of business in Lynn, Massachusetts. West Lynn is licensed by the Commissioner to sell milk in the Commonwealth of Massachusetts. West Lynn purchases raw milk from producers (dairy farmers) and producer-cooperatives. It then processes and packages milk in its processing

plant and sells in Massachusetts approximately 60% of the milk that it purchases. West Lynn purchases 97.3% of its milk from farms located outside the Commonwealth.

2. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, *inter alia*, with the regulation of the milk industry in Massachusetts under the provisions of M.G.L. ch. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

BACKGROUND

3. On January 28, 1992, the Commissioner, citing the Massachusetts Milk Control Law, M.G.L. ch. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a Pricing Order on February 18, 1992, which was amended on February 26, 1992. A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.

4. The Pricing Order requires all licensed milk dealers doing business in Massachusetts, including West Lynn, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a monthly basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.

5. The amounts paid into the Fund are held by the Commissioner and are not deposited into the General Fund of the Commonwealth. The monies deposited into the Fund are distributed monthly by the Commissioner *pro rata* to Massachusetts dairy farmers *only*, notwithstanding that most of the milk purchased by West Lynn and sold to consumers in Massachusetts is imported from other states.

6. Pursuant to the express terms of the Pricing Order, the total annual assessment against West Lynn will amount to more than \$1 million (\$107,201.70 in May of 1992), all of which is to be distributed to Massachusetts producers only, despite the fact that 97% of the milk purchased by West Lynn is produced by out-of-state farmers.

7. West Lynn paid \$80,571.85 into the Fund on or about May 25, 1992 for the April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.

8. On June 25, 1992, the Commissioner determined that West Lynn was required to make an assessment payment for the month of May pursuant to the Pricing Order. West Lynn objected to making payment and asserted that the Pricing Order burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

9. On July 2, 1992, West Lynn, under protest, made payment to the Commissioner in the amount of \$107,201.70 for the May assessment.

10. The Commissioner disbursed West Lynn's \$107,201.70 payment amongst the Massachusetts farmers in July of 1992.

11. Under the Pricing Order, West Lynn's June assessment was due on July 25, 1992. West Lynn, however, did not make that payment because the Pricing Order violates the Commerce Clause of the United States Constitution.

12. Under the Pricing Order, West Lynn's July assessment was due on August 25, 1992. West Lynn, however, did not make that payment because the Pricing Order violates the Commerce Clause of the United States Constitution.

13. On September 9, 1992, West Lynn received a Notice from the Commissioner. A copy of the Notice is attached as Exhibit C. The Notice set a hearing date to "revoke, modify

or suspend" West Lynn's license to sell milk. No reason for the proposed action was set forth in the Notice.

14. On September 14, 1992, the Commissioner conducted a hearing pursuant to Exhibit C.

15. On November 16, 1992, the Commissioner conditionally revoked West Lynn's license to sell milk in the Commonwealth of Massachusetts for failure to make assessment payments under the Pricing Order. A true copy of the Commissioner's decision is attached as Exhibit D.

16. West Lynn does not intend to comply with the conditions imposed by the Commissioner's November 16, 1992 Order because it believes that the imposition of these conditions violates the Commerce Clause.

17. The revocation of West Lynn's milk dealer's license will cause West Lynn to suffer irreparable harm in that it will not be able to sell milk lawfully within the Commonwealth.

18. If West Lynn is not able to sell milk in the Commonwealth, it will be substantially damaged and more than 1,000 employees may be laid off from their jobs.

19. The Actions of the Commissioner, as set forth above, violate the Commerce Clause of the United States Constitution.

20. The Notice of Hearing, Exhibit C, does not provide adequate notice of the purpose of the hearing in violation of the due process clauses of the Massachusetts and United States Constitutions.

21. The hearing conducted by the Commissioner on September 14, 1992 violated the due process clauses of the United States and Massachusetts Constitutions because the Commissioner was not a fair and impartial hearing officer in that he was seeking to enforce an Order that he personally promulgated.

22. The findings of the Commissioner with respect to the effect of the Amended Pricing Order on interstate commerce and with respect to the effect of the Amended Pricing Order on the production and demand for milk are not supported by substantial evidence and are clearly erroneous.

WHEREFORE, West Lynn Creamery, Inc. respectfully requests this Court to grant the following relief:

1. reverse the Commissioner's order conditionally revoking West Lynn's milk dealer's license for failure to make assessment payments pursuant to the Amended Pricing Order;
2. declare the Commissioner's order unlawful and unconstitutional;
3. stay the Commissioner's November 16, 1992 decision conditionally revoking West Lynn's milk dealers' license effective December 1, 1992.
4. stay all enforcement action by the Commissioner, particularly any actions which may result in the revocation of West Lynn's milk dealer's license or the imposition of any penalty, as a result of West Lynn's failure to make assessment payments;
5. issue a short order of notice on paragraphs 3 and 4, above; and
6. grant such other and further relief which this Court deems just and proper.

WEST LYNN CREAMERY, INC.

By its attorneys,

Michael L. Altman
BBO No. 016800
Margaret A. Robbins
BBO No. 559920
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7074

Dated: November 17, 1992

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL ACTION
NO. 92-6924**

LeCOMTE'S DAIRY, INC.,)
Plaintiff,)
)
v.)
GREGORY WATSON,)
COMMISSIONER, Massachusetts)
Department of Food and)
Agriculture,)
Defendant.)

**PETITION FOR REVIEW OF COMMISSIONER OF
MASSACHUSETTS DEPARTMENT OF FOOD
AND AGRICULTURE'S DECISIONS**

Pursuant to M.G.L. ch. 94A, §§ 8 and 21, LeComte's Dairy, Inc. ("LeComte's") hereby petitions this Court to review the decision of the Commissioner of Food and Agriculture (the "Commissioner"), dated November 16, 1992, conditionally revoking LeComte's milk dealer's license for failure to make "assessment" payments pursuant to the Commissioner's Amended Pricing Order (the "Pricing Order").

PARTIES

1. The plaintiff, LeComte's Dairy, Inc. ("LeComte's") is a Massachusetts corporation with a principal place of business in Somerset, Massachusetts. LeComte's sells milk and related dairy products to various retailers, convenience stores, nursing

homes, restaurants, etc. LeComte's is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. ch. 94A, to sell milk in the Commonwealth of Massachusetts. It purchases one hundred (100%) percent of its fluid milk products from West Lynn Creamery, Inc. West Lynn Creamery purchases 97.3% of its raw milk from out-of-state farmers.

2. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, *inter alia*, with the regulation of the milk industry in Massachusetts under the provisions of M.G.L. ch. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

BACKGROUND

3. On January 28, 1992, the Commissioner, citing the Massachusetts Milk Control Law, M.G.L. ch. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a Pricing Order on February 18, 1992, which was amended on February 26, 1992. A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.

4. The Pricing Order requires all licensed milk dealers doing business in Massachusetts, including LeComte's, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a monthly basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.

5. The amounts paid into the Fund are held by the Commissioner and are not deposited into the General Fund of the Commonwealth. The monies deposited into the Fund are dis-

tributed monthly by the Commissioner *pro rata* to Massachusetts dairy farmers *only*, notwithstanding that most of the milk purchased by LeComte's and sold to consumers in Massachusetts is imported from other states.

6. On or about May 25, 1992 LeComte's paid \$3,195.54 into the Fund for its April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.

7. On or about June 25, 1992, LeComte's paid \$4,248.63 to the Commissioner pursuant to his Pricing Order. The Commissioner disbursed LeComte's payment to the Massachusetts farmers in July of 1992.

8. Under the Pricing Order, LeComte's June assessment was due on July 25, 1992. LeComte's did not make payment because the Pricing Order violates the Commerce Clause of the United States Constitution.

9. Under the Pricing Order, LeComte's July assessment was due on August 25, 1992. LeComte's did not make payment because the Pricing Order violates the Commerce Clause of the United States Constitution.

10. On September 9, 1992, LeComte's received a Notice from the Commissioner. A copy of the Notice is attached as Exhibit C. The Notice set a hearing date to "revoke, modify or suspend" LeComte's license to sell milk. No reason for the proposed action was set forth in the Notice.

11. On September 14, 1992, the Commissioner conducted a hearing pursuant to Exhibit C.

12. On November 16, 1992, the Commissioner conditionally revoked LeComte's license to sell milk in the Commonwealth of Massachusetts for failure to make assessment payments under the Pricing Order. A copy of the Order issued by the Commissioner is attached as Exhibit D.

13. LeComte's does not intend to comply with the conditions imposed by the Commissioner's November 16, 1992

Order because it believes that the imposition of these conditions violates the Commerce Clause.

14. The revocation of LeComte's license to sell milk will cause LeComte's to suffer irreparable harm in that it will not be able to sell milk lawfully in the Commonwealth.

15. If LeComte's is not able to sell milk in the Commonwealth, it will suffer substantial economic loss.

16. The actions of the Commissioner, as set forth above, violate the Commerce Clause of the United States Constitution.

17. The Notice of Hearing, Exhibit C, does not provide adequate notice of the purpose of the hearing in violation of the due process clauses of the Massachusetts and United States Constitutions.

18. The hearing conducted by the Commissioner on September 14, 1992 violated the due process clauses of the United States and Massachusetts Constitutions because the Commissioner was not a fair and impartial hearing officer in that he was seeking to enforce an Order that he personally promulgated.

19. The findings of the Commissioner with respect to the effect of the Amended Pricing Order on interstate commerce and with respect to the effect of the Amended Pricing Order on the production and demand for milk are not supported by substantial evidence and are clearly erroneous.

WHEREFORE, LeComte's Dairy, Inc. respectfully requests this Court to grant the following relief:

1. reverse the Commissioner's order conditionally revoking LeComte's milk dealer's license for failure to make assessment payments pursuant to the Amended Pricing Order;

2. declare the Commissioner's order unlawful and unconstitutional;

3. stay the Commissioner's November 16, 1992 decision conditionally revoking LeComte's milk dealers' license effective December 1, 1992;

3. stay all enforcement action by the Commissioner, particularly any actions which may result in the revocation of LeComte's milk dealer's license or the imposition of any penalty, as a result of LeComte's failure to make the June payment;

4. issue a short order of notice on paragraph 3, above; and

5. grant such other and further relief which this Court deems just and proper.

LECOMTE'S DAIRY, INC.

By its attorneys,

Michael L. Altman
BBO No. 016800
Margaret A. Robbins
BBO No. 559920
Rubin and Rudman
50 Rows Wharf
Boston, Massachusetts 02110
(617) 330-7074

Dated: November 17, 1992

COMMONWEALTH OF MASSACHUSETTS**SUFFOLK, ss.****SUPERIOR COURT
CIVIL ACTIONS****WEST LYNN CREAMERY, INC. and
LeCOMTE'S DAIRY, INC.****vs.****NO. 92-4610G****GREGORY C. WATSON, COMMISSIONER
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE****WEST LYNN CREAMERY, INC.****vs.****NO. 92-6914G****GREGORY C. WATSON, COMMISSIONER****LeCOMTE'S DAIRY, INC.****vs.****NO. 9224G****GREGORY C. WATSON, COMMISSIONER****MEMORANDUM AND ORDER DENYING
INJUNCTIVE RELIEF**

The plaintiffs process, package and/or sell milk under license of the Massachusetts Department of Food and Agriculture.

The defendant Watson is the Commissioner of the Department. On January 28, 1992, the Commissioner, acting pursuant to G.L. c. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry and issued an Amended Pricing Order on February 26, 1992.

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Liquidization Fund. The amounts deposited are then distributed to dairy farmers in the Commonwealth.

For the purposes of this proceeding, the three (3) captioned cases will be considered as a single action.

The plaintiff West Lynn Creamery, Inc. (West Lynn) did not pay the assessment due on July 25, 1992 nor in the months thereafter. Neither did LeComte's Dairy, Inc. and some other milk dealers.

After notice, the Commissioner conducted a hearing on September 14 1992 and by a Decision dated November 16, 1992, conditionally revoked West Lynn's milk dealers license for failure to pay the assessment required by the Pricing Order. The license will be revoked on December 1, 1992 unless the assessment is paid.

The plaintiffs are requesting a preliminary injunction to enjoin the Commissioner from revoking West Lynn's and LeComte's milk dealers licenses on that date.

In its Petition For Review, West Lynn asserts that it does not intend to comply with the conditions imposed by the November 16, 1992 Order of the Commissioner because it believes that those conditions violate the Commerce Clause of the United States Constitution. It further states that if it is not licensed to sell milk in the Commonwealth after December 1, 1992, more than 1,000 employees may be laid off.

This position is confirmed by an affidavit of one of the principal owners and Executive Vice President for Sales and Marketing delivered to the court this morning.

This is a choice West Lynn must make. A more reasonable approach might be to pay the assessment and seek an early hearing on the merits.

JA110

After considering the arguments, briefs and other well prepared submissions of counsel and studying the findings, declarations, orders and decisions of the Commissioner of the Massachusetts Department of Food and Agriculture, the plaintiffs have not demonstrated a reasonable likelihood of success on the merits or that they would suffer irreparable harm if injunctive relief was not granted.

ORDER

Accordingly, it is **ORDERED** that entry be made **DENYING** PLAINTIFF'S SECOND EMERGENCY MOTION FOR PRELIMINARY INJUNCTION dated November 17, 1992.

John L. Murphy, Jr.
Justice of the Superior Court

DATED: November 24, 1992

JA111

COMMONWEALTH OF MASSACHUSETTS

**SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 92-4610-G**

**WEST LYNN CREAMERY, INC.
and
LeCOMTE'S DAIRY, INC.**

vs.

**GREGORY C. WATSON, COMMISSIONER
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE**

SUFFOLK, ss.

**CIVIL ACTION
No. 92-6914-G**

WEST LYNN CREAMERY, INC.

vs.

**GREGORY WATSON, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE**

SUFFOLK, ss.

**CIVIL ACTION
No. 92-6924-G**

LeCOMTE'S DAIRY, INC.

vs.

**GREGORY C. WATSON, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF FOOD
AND AGRICULTURE**

JA112

AMENDMENT TO MEMORANDUM AND ORDER
DENYING
INJUNCTIVE RELIEF ENTERED ON NOVEMBER
24, 1992

The fourth paragraph of the above mentioned Memorandum and Order is amended by striking the word "Liquidation" and inserting in place thereof the word "Equalization" so that the sentence reads:

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Equalization Fund.

SO ORDERED.

John L. Murphy, Jr.
Justice of the Superior Court

DATED: November 25, 1992

JA113

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

92-J-827

WEST LYNN'S CREAMERY, INC. and
LeCOMTE'S DAIRY, INC.

vs.

COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE
(and two companion cases).

ORDER

These cases come before me under G.L. c. 231, § 118, par. 1. The petitioners seek relief from an order entered in the Superior Court on November 24, 1992, denying their motions for preliminary injunctions to stop the revocations on December 1, 1992, of their milk dealer's licenses. On November 25 I entered an order staying the revocations pending disposition of West Lynn Creamery's and LeComte's Dairy petition for review.

The threatened revocations were based on the failure of the two dealers to make payments for the months of June and July, 1992, into the Massachusetts Dairy Equalization Fund, established by an "Amended Pricing Order" entered February 26, 1992. This was an emergency order intended to infuse cash into Massachusetts dairy farms (producers), which were faced with the danger of extinction due to rising costs of production and falling Federal milk price-supports. The payments by milk dealers into the fund were to be based on a formula computed on the basis of a differential between a target price calculated to stabilize the market and the so called "zone 21 blend price" reported monthly by the United States

Department of Agriculture, multiplying the difference by the amount of milk sold monthly for consumption in Massachusetts, calculated in pounds. The fund is distributed monthly to Massachusetts producers in relation to their monthly production (up to a 200,000 pound limit).

From an affidavit furnished by the Commissioner, it appears that dealers generally complied with the amended price order at the outset until West Lynn Creamery and LeComte's Dairy refused to make the payments due for June and July. The result was a shortfall in the fund for distribution in July and August. By October most dealers were refusing to pay their monthly assessments, and the fund is apparently now inoperative. The Commissioner entered orders on November 16 revoking the licenses of West Lynn Creamery and LeComte's Dairy for failure to make payments for June and July. The orders were not to take effect until December 1 and would not take effect at all if the two dealers were to make the required payments for June and July and were to file reports for the subsequent months, with the required payments, by December 1. On November 17 the dealers filed petitions for judicial review of the revocation orders under G. L. c. 94A, §§ 8 and 21, and, in conjunction therewith, sought the preliminary injunctive relief that was denied in the Superior Court.

The dealers' contention is that the pricing orders establishing the Equalization Fund are invalid under the Commerce Clause of the United States Constitution. They argue that they will suffer irreparable harm if they are made to pay their mandated assessments into the fund because the amounts paid in are distributed to producers by the fifth day of the succeeding month and will be unrecoverable as a practical matter. At the hearing before me they offered to pay into court, to be held in escrow pending determination of their petitions for review, the amounts that were due through November 25, 1992, which apparently total \$367,343 in the case of West Lynn Creamery and \$11,732 in the case of LeComte's Dairy.

The escrow solution is not acceptable to the Commissioner or to the producers (as represented by various amici curiae, such as the Massachusetts Farm Bureau Federation and the Massachusetts Assn. of Dairy Farmers) in light of the emergency existing among the producers, most of which are small or small to moderate sized dairy farms, and in light of their position that the money was raised, in practical effect from Massachusetts consumers and is equitably owned either by them or by Massachusetts farmers (if the price order is valid) but in no event by the dealers, who, the producers contend, would receive a windfall because they have priced milk for Massachusetts consumption so as to recover the cost of the Equalization Fund assessments.

The only clear aspect of this complicated picture is that the public interest would best be served by the earliest possible resolution of the underlying Constitutional issue. The Equalization Fund is presently inoperative, and dairy farmers are being penalized unfairly if the Amended Price Order is valid and should be enforced. To empower the Commissioner to enforce the price order solves the farmers' problem but is unfair to both Massachusetts consumers and out-of-State producers if the entire pricing scheme is, as the dealers argue, unconstitutional. The continuing uncertainty is prejudicial to dealers, who must set current prices in ignorance whether they will ultimately have to pay the Equalization Fund assessments. A speedy determination of the underlying Constitutional issue is the fairest solution for all parties.

At the hearing the court discussed with counsel the possibility of an early resolution through the vehicle of an interlocutory appeal under G.L. c. 231, § 118, par. 2, from the order denying the preliminary injunction. As the pending petitions for review are governed by Administrative Procedure Act principles, with little or no role for fact-finding by the court, such a resolution seemed plausible. In response to the court's request that counsel

confer amongst themselves and advise the court, I have been informed that counsel for the parties are in agreement on such a course. They have suggested the following accelerated briefing schedule: the dealers' briefs will be submitted on December 9, 1992; the Commissioner's brief on December 17; and the dealer's reply brief, if any, by December 22. The court accepts this schedule and has set the case¹ down for argument at 10:00 A.M., Tuesday, December 29, 1992.

Pending resolution of the appeal, taking into account the likelihood of success on the merits and balancing the hardships and equities to all parties, the court declines (as did the Superior Court judge, Murphy, J.) to stay beyond December 15 the Commissioner's decisions in the license revocation proceedings, as those decisions apply to the assessments that were required to be paid for June (due July 25, 1992), July (due August 25), and August (due September 25), during which times the majority of the milk dealers were paying their assessments into the Equalization Fund. If those payments are made to the Department prior to December 16, the stay of the license revocation decisions that was entered in this court on November 25 will remain in effect pending determination of the appeal, subject to further order by the panel that hears the appeal.²

There was some confusion at the hearing concerning the status of certain persons and organizations other than West Lynn Creamery, LeComte's Dairy, and the Commissioner of Agriculture. Prior to the hearing the court allowed several motions to file amicus briefs or memoranda. (These were received and the attorneys involved were heard in the argument.) It was not the court's intention to allow any motion to intervene.

¹ The court assumes, of course, that the appeal from the Trial Court's Order denying the injunction has been filed and that the appeal will be entered in this court.

² For the sake of clarity, the court states (1) that it has placed no restriction on the Commissioner in the distribution of amounts paid to the Department for the Equalization Fund, and (2) that it is not at this time ordering that the assessments due for September and October be placed in escrow with the court.

Any such allowance is vacated. For purposes of the appeal this court will treat as parties only those who are parties in the Superior Court proceeding. However, all persons or organizations that were permitted to file amicus briefs in the single justice proceeding are hereby authorized to file amicus briefs in the appeal. Argument by amici will be in the discretion of the panel that hears the appeal. Rule 17 of the Mass. Rules of App. Procedure applies, except that amicus briefs may be filed up to and including December 22.

By the Court
(Armstrong, J.),

Assistant Clerk

Entered: December 8, 1992.

WEST LYNN CREAMERY, INC. & another¹

vs.

**COMMISSIONER OF THE
DEPARTMENT OF FOOD AND AGRICULTURE
(and two companion cases²).**

**SUFFOLK. January 6, 1993 –
April 15, 1993.**

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH, &
GREANEY, JJ.

Constitutional Law, Interstate commerce. Milk Control.

A milk pricing order pursuant to G. L. c. 94A, §§ 10-12, issued by the Department of Food and Agriculture, did not discriminate against interstate commerce so as to violate the commerce clause of art. I, § 8, of the United States Constitution, where the order, having as its purpose the preservation of the viability of the milk industry in the Commonwealth, was not discriminatory on its face; where the order was applied evenhandedly to in-State and out-of-State dealers; and where the regulatory burden it imposed on interstate commerce, by requiring all licensed milk dealers to contribute, according to a prescribed formula, to an "equalization

¹ LeComte's Dairy, Inc.

² West Lynn Creamery, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6914-G (judicial review of license revocation); LeComte's Dairy, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6924-G (judicial review of license revocation).

fund" for distribution to Massachusetts producers, was merely indirect and incidental. [14-19].

CIVIL ACTIONS commenced in the Superior Court Department, one on July 24, 1992, and two on November 18, 1992.

Motions for preliminary injunctive relief were heard by *R. Malcolm Graham, J.*, and *John L. Murphy, Jr., J.*, respectively.

After the latter two cases were reported to the Appeals Court by *J. Harold Flannery, J.*, the proceedings were consolidated for hearing in that court. The Supreme Judicial Court transferred them on its own initiative.

Michael L. Altman (*Margaret A. Robbins* with him) for the plaintiffs.

Eric A. Smith, Assistant Attorney General, for the defendant.
The following submitted briefs *for amici curiae*:

Robert J. Sherer & Francis A. DiLuna for Massachusetts Farm Bureau Federation.

Allen Tupper Brown for Massachusetts Association of Dairy Farmers & others.

Marshall M. Schribman for Massachusetts Cooperative Milk Producers Federation, Inc.

Steven J. Rosenbaum & Andrew I. Schoenholtz, of the District of Columbia, & *Richard M. Zielinski, Neil v. McKittrick & Joshua M. Davis* for Milk Industry Foundation.

NOLAN, J. The plaintiffs, West Lynn Creamery, Inc. (West Lynn), and LeComte's Dairy, Inc. (LeComte), are milk dealers licensed by the Department of Food and Agriculture (department) pursuant to G. L. c. 94A (1990 ed.).³ West Lynn is a domestic corporation with its principal place of business in

³ The department defines a "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk."

Lynn. West Lynn purchases milk from producers and producer-cooperatives and sells in Massachusetts about sixty per cent of the milk purchased.⁴ West Lynn purchases most of its milk from out-of-State producers. LeComte is also a domestic corporation with its principal place of business in Somerset. LeComte purchases all of its milk from West Lynn and sells it to retailers, convenience stores, nursing homes, and restaurants.

Under G. L. c. 94A, the Commissioner of the department is vested with wideranging powers to supervise and regulate the milk industry of the Commonwealth. § 2. Among other things, the Commissioner is empowered to issue licenses to milk dealers, § 5, and to establish minimum prices to be paid for milk "which will best protect the milk industry in the commonwealth and insure a supply of pure, fresh milk adequate to cover consumer needs." § 10. The Commissioner fixes the minimum price to be paid to milk "producers" by issuing an order. §§ 11, 12. The Commissioner is empowered to suspend or revoke the license of a milk dealer who fails to comply with department orders, rules, or regulations. §§ 6, 7. The root of the dispute in the present cases is the Commissioner's revocation of the plaintiffs' milk dealers' licenses due to their failure to comply with a pricing order. The plaintiffs contend that the pricing order violates the commerce clause of art. I, § 8, of the United States Constitution.⁵ We disagree.

The order that is the subject of this case was issued by the Commissioner in response to the economic crisis facing dairy farmers in Massachusetts. The background to the issuance of the order is as follows. In November, 1991, a petition was delivered to the department requesting that the Commissioner

⁴The department defines a "producer" of milk as "any person producing milk from dairy cattle."

⁵The commerce clause provides that "congress shall have power to regulate commerce with foreign nations, and among the several states."

hold hearings regarding the state of the dairy industry in Massachusetts. See G. L. c. 94A, § 12. The Commissioner held public hearings in January, 1992, conducted subsequent investigations, and interviews, and thereafter declared that the Massachusetts dairy industry was in a state of emergency.⁶

On February 26, 1992, in response to this state of emergency, the Commissioner issued an amended pricing order, pursuant to G. L. c. 94A, §§ 10-12.⁷ The pricing order sets forth a plan designed to boost the amount of money local dairy farmers — the producers — receive for milk above and beyond that required by the Federal program.⁸ The pricing order requires milk

⁶The Commissioner declared that "an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens . . . the economy of our entire state, the enviable lifestyle we enjoy here, and the health of our consumers. . . ."

"The industry, nationwide, is in serious trouble, and ultimately a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry and its attendant benefits. While the dairy farmers receive prices for their product equal to those in 1978, the costs of producing milk continue to skyrocket out of their control. . . ."

"Dairying maintains hundreds of thousands of acres of open space and the scenic vistas on which our state's vital tourist industry depends. It generates millions of dollars into our economy, in payroll, taxes and purchases, while providing a fresh and nutritious food product at a fraction of the price paid by consumers elsewhere in the nation and the world."

"Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem."

⁷The Commissioner's first order was issued on February 18, 1992. The amended order was issued "for technical, clarification purposes." The February 18, 1992, order is not at issue on this appeal.

⁸The preamble to the pricing order provides: "The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices. This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk."

dealers to submit monthly reports and to contribute to the Massachusetts Dairy Equalization Fund (fund). The monthly reports require, among other things, each licensed milk dealer to report the amount of "Class I" milk sold for consumption in Massachusetts during the reporting period.⁹ Each milk dealer's monthly contribution to the Fund is calculated by multiplying the volume of "Class I" milk sold during the reporting month, regardless of point of origin, by an "Order Premium."¹⁰ The Commissioner distributes the fund to producers in proportion to the milk produced in Massachusetts during the preceding month. The pricing order took effect immediately. The first monthly report, covering April, 1992, was due May 25, 1992.

West Lynn and LeComte submitted reports for the periods April through July, 1992. The plaintiffs paid their premiums for April and May, but discontinued payments thereafter. On July 24, 1992, the plaintiffs filed an action in the Superior Court Department alleging, among other things, that the pricing order violated the commerce clause. They argued that the pricing order places out-of-State farmers at a competitive disadvantage because it subsidizes Massachusetts farmers but not out-of-State farmers, all of whom are selling milk in Massachusetts, and sought declaratory relief, damages, a preliminary injunction, and a permanent injunction to prevent the Commissioner from collecting the monthly premiums. On July 31, 1992, a judge in the Superior Court denied the plaintiffs' request because they had failed to establish irreparable harm. The judge

⁹ The "Class I" designation refers to milk consumed as fluid rather than processed into other products, e.g., cheese.

¹⁰ The pricing order establishes a target price for milk. The order premium is equal to one-third of the difference between the target price and the so-called "blend price" reported monthly by the United States Department of Agriculture. In the pricing order the Commissioner fixed the target price at \$15 a hundred pounds of milk (hundredweight or cwt.). Assuming that the federally mandated price is \$12 a cwt., the order premium would be \$1.

also denied their request to deposit the required premiums with the court.¹¹

Meanwhile, West Lynn and LeComte continued to dispute the legality of the pricing order, and failed to comply with its provisions. In June and July, 1992, the Commissioner initiated administrative action against both West Lynn and LeComte seeking to suspend or to revoke their licenses for failing to comply with the pricing order.

In response to the Commissioner's action, on August 7, 1992, plaintiffs filed an "emergency" motion for a preliminary injunction seeking the same relief that the earlier motion sought: a preliminary injunction enjoining the Commissioner from imposing any penalty, including but not limited to, suspending or revoking their milk dealers' licenses for failure to pay the equalization premiums required by the Commissioner's amended pricing order. On August 14, 1992, the judge denied the requests for preliminary injunctive relief because the plaintiffs again failed to demonstrate any irreparable harm. The judge held that payment into the fund does not constitute irreparable harm because the pricing order does not require the plaintiffs to absorb the cost of the equalization premiums. Rather, the judge reasoned, the plaintiffs can pass on the equalization premiums to consumers. The judge also noted that, if the Commissioner should suspend or revoke the plaintiffs' licenses, his decision is reviewable, G. L. c. 94A, § 8; hence, their claim was premature.

On September 14, 1992, the Commissioner held hearings, and on November 16, 1992, conditionally revoked the plaintiffs' licenses, see G. L. c. 94A, §§ 6, 7, for failing to comply with the pricing order.¹² The Commissioner denied the plain-

¹¹ The plaintiffs assert that, once the payments are paid into the fund and distributed to Massachusetts dairy farmers, there is no practical remedy for recouping the funds if the pricing order is found to be unconstitutional.

¹² The Commissioner conditioned revocation of the licenses on continuing non-compliance with the pricing order. The Commissioner's revocation order was effective fourteen days after issuance.

tiffs' commerce clause challenge, stating, "[W]hile the [Pricing] Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied evenhandedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states."

On November 17, 1992, the plaintiffs filed a second emergency motion for a preliminary injunction requesting that the Superior Court enjoin the Commissioner from revoking their licenses. In an affidavit supporting its motion, West Lynn stated that it did not intend to comply with the conditions of the Commissioner's November 16, order. West Lynn also noted that, if it is not licensed to sell milk in the Commonwealth, more than 1,000 employees may be laid off. Additionally, on November 18, 1992, the plaintiffs filed separate actions in the Superior Court seeking judicial review of the Commissioner's decisions to revoke the plaintiffs' milk licenses, G.L. c. 94A, §§ 8, 21, and requesting stays of enforcement action pending judicial review.

On November 24, 1992, a Superior Court judge, in a consolidated order, amended on November 25, denied the plaintiffs' second request for an emergency preliminary injunction, and their request for a stay of the revocation action pending judicial review. The judge reasoned that the plaintiffs had failed to demonstrate a reasonable likelihood of success on the merits and that they would suffer irreparable harm. The judge wrote that the plaintiffs should "pay the assessment [premium] and seek an early hearing on the merits." The plaintiffs then petitioned a single justice of the Appeals Court, G. L. c. 231, § 118, 1st par. (1990 ed.), seeking interlocutory relief from the Superior Court's denial of the emergency motion for a preliminary injunction. On November 25, 1992, the single

justice issued an order staying the Commissioner's November 16, 1992, revocation orders pending further review. After a hearing on December 1, 1992, the single justice agreed to extend the stay beyond December 15, 1992, if the plaintiffs paid the amounts due under the pricing order for the months June, July, and August, 1992.

On December 11, 1992, another judge in the Superior Court, reserved and reported the plaintiffs' cases concerning judicial review of the Commissioner's revocation orders to the Appeals Court. See Mass. R. Civ. P. 64, 365 Mass. 831 (1974). On December 15, 1992, the Appeals Court granted a motion to consolidate the three cases.

To expedite the appeals, the parties agreed, with the assent of the single justice, to seek interlocutory relief from a panel of the Appeals Court pursuant to G. L. c. 231, § 118, 2d par. We transferred these cases to this court on our own motion, and we hold the pricing order constitutional.

The sole question facing us from the three appeals concerns the constitutionality of the pricing order. It is long established that, while a literal reading of the commerce clause evinces a grant of power to Congress, it "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.*, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). If the Commissioner's pricing order discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the Commissioner "to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986), citing *Hughes v. Oklahoma*, 441 U.S.

322, 336 (1979). Justification supporting a discriminatory measure is subjected to strict scrutiny. *Id.* at 138, 144. In cases where the regulatory measure under study amounts to "simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." *Wyoming v. Oklahoma*, *supra* at 800, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

On the other hand, if the pricing order has only indirect or incidental effects on interstate commerce, it will be found to violate the commerce clause only if the burdens imposed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine v. Taylor*, *supra* at 138, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court has applied reduced scrutiny in such cases, but there is no clear line separating close cases on which scrutiny should apply. See *Wyoming v. Oklahoma*, *supra* at 800 n.12, and cases cited.

As one would expect, the plaintiffs contend that the Commissioner's pricing order is discriminatory on its face, and argue in favor of the application of strict scrutiny. The Commissioner contends that we should review the matter with reduced scrutiny because the pricing order burdens interstate commerce incidentally, if at all. We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund.

All milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund. Accordingly, the pricing order does not favor in-State milk dealers to the detriment of its out-of-State competitors. In this regard, then, the pricing order is evenhanded in its design and effect.

The pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935).

Rather, the milk dealer's premium, as required under the pricing order, is fixed only by the Commissioner's target price, the federally mandated price, and the amount of milk the dealer sells for consumption in Massachusetts. See *supra* at 11-12 & note 10. A milk dealer's required premium is independent of the price the milk dealer has paid for the milk or the milk's point of origin. In this way the pricing order does not manifest any preference for in-State milk over out-of-State milk.

The pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers. On the contrary, milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs. As noted above, the premium required under the pricing order is independent of the price paid for the milk or its point of origin.

Further, the plaintiffs argue that the pricing order denies out-of-State milk producers the opportunity to compete with in-State milk producers because out-of-State milk, if sold in Massachusetts, is subject to the Massachusetts premium. Assuming, without deciding, that the plaintiffs, as milk dealers, have standing to raise this challenge, the argument is without merit. For the reasons mentioned above, we are not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers.

The Commissioner's pricing order was designed to aid only Massachusetts producers. Indeed, Massachusetts producers are entitled to disbursements from the fund based on the volume of milk produced, to the exclusion of its out-of-State competitors. The plaintiffs contend that this discriminatory distribution plan burdens interstate commerce because it will cause less out-of-State milk to be imported into Massachusetts. As Massachusetts farmers receive more and more money from the fund, the plaintiffs argue, Massachusetts producers will produce more milk, and local production will then constitute a greater percentage of the total milk sold in Massachusetts.

Again we assume, without deciding, that the plaintiffs have standing to assert such a challenge. We concede that the fund distribution scheme affects interstate commerce in this manner but it does so only incidentally. Contrary to the assumption underlying the plaintiffs' argument, it is clear from the Commissioner's "Report Subsequent to Public Hearing" on the state of the dairy industry in Massachusetts, that fund distributions represent an infusion of capital designed solely to save an industry from collapse.¹³ Given the Commissioner's report and the balance of the record, we cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers.

This not to say, however, that the fund distribution plan is without its adverse impact on interstate commerce. Common sense necessitates a contrary conclusion. The fund distribution scheme does burden out-of-State producers, to the extent that these producers are not entitled to receive fund disbursements, but we hold that the burden is incidental given the purpose and design of the program.

The plaintiffs' reliance on *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, is misplaced. *Baldwin*, like the present case, involved milk dealers and State regulation of milk prices. The *Baldwin* regulation, however, differs from that under study in the present cases. In *Baldwin*, the United States Supreme Court found unconstitutional a regulation that prohibited State licensed milk dealers from selling milk produced out-of-State unless the out-

¹³ The Commissioner found that the dealers' evidence did not support their claim that the order would affect the price out-of-State producers received from Massachusetts dealers. He further rejected the claim that the order would increase milk production by Massachusetts producers. He found that the record showed that Massachusetts producers had decreased production since the order had gone into effect. The Commissioner reasoned that the prediction of an increase of production was "speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers."

of-State milk producers were paid New York's minimum price for the milk. *Baldwin v. G.A.F. Seelig, Inc.*, *supra* at 519. Justice Cardozo wrote, "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.* at 522.

The constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation. While the pricing order in the present case was born of a similar concern for the dairy farmer, the support system that the Commissioner has promulgated, as discussed above, cannot fairly be said to be discriminatory or protectionist as was the one at issue in *Baldwin*.¹⁴

In the present case, "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Id.* at 523, citing *Nebbia v. New York*, 291 U.S. 502 (1934). Such an end is legitimate. See *Baldwin*, *supra* at 519. The power of the Commonwealth to regulate the milk industry within its borders is clear. See *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1251

¹⁴ The plaintiffs also direct our attention to *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1248 n.5 (S.D.N.Y. 1992), in support of its argument. To the extent that we can discern from the opinion, it is inapposite. *McGuire*, like the present cases, involved State pricing regulation of the milk industry. Like *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and with similar fate, the State involved was New York. The fact distinguishing *McGuire* from the present case is that the price New York State farmers were paid for milk "increased proportionately with the amount of non-New York Class I milk sold in New York." *Id.* at 1248 n.5. Thus the *McGuire* pricing order provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses. As the *McGuire* court found, a regulatory scheme tilted in such a fashion to benefit in-State interests impermissibly burdens interstate commerce. *Id.* at 1254.

JA130

(S.D.N.Y. 1992) (State is empowered to fix minimum prices for milk sold by dairy farmers within its borders), citing *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 378 (1964). The premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay. The Commissioner's pricing order may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts. While this may be the case, relief is beyond our province.

In view of the merely incidental burden on interstate commerce, the end to which the pricing order is aimed, and the resultant benefit to the Commonwealth's dairy industry, we conclude that local benefits outweigh any incidental burden on interstate commerce and hold that the pricing order does not violate the commerce clause. We remand the cases to the Superior Court for action not inconsistent with this opinion.

So ordered.

JA131

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

1412 Courthouse,
Boston, Massachusetts 02108
(617) 557-1020

Michael L. Altman, Esquire
Rubin and Rudman
50 Rows Wharf
Boston, MA 02110

Re: No. SJC-06140

WEST LYNN CREAMERY, INC., & another

v.

COMMISSIONER OF THE DEPARTMENT OF
FOOD AND AGRICULTURE (and two
companion cases)

NOTICE OF DOCKET ENTRY

Please take note that on June 9, 1993, the following entry was made on the docket of the above-referenced case:

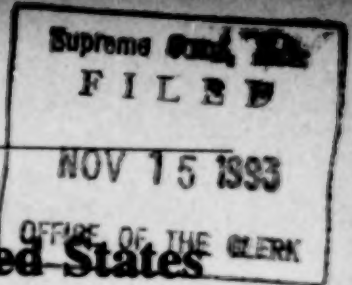
ORDER: Pursuant to the Standing Order dated March 29, 1988, the Emergency Motion for Stay of Issuance of Rescript, Request for Oral Argument and Motion for Stay of Any Order (papers 9, 10 and 11), the Court has considered the motions and they are hereby allowed. The request for oral argument is denied.

Jean M. Kennett,
Clerk

Dated: June 9, 1993

6
No. 93-141

**In the
Supreme Court of the United States**



October Term, 1993

**WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,**
Petitioners,

v.

**JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,**
Respondent.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITIONERS' BRIEF ON THE MERITS

PETITION FOR CERTIORARI FILED
JULY 14, 1993.

CERTIORARI GRANTED OCTOBER 4, 1993.

MICHAEL L. ALTMAN
Counsel of Record
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Does a state law requiring milk dealers to pay a minimum price on all fluid milk sold within the state, including milk produced out-of-state, which raises funds to pay local dairy farmers the increased minimum price by imposing an assessment on the sale of all milk, including milk produced outside the state, violate the Commerce Clause of the United States Constitution within the meaning of this Court's decision in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)?

2. Does the burden imposed on interstate commerce by a state law which requires milk dealers to pay a minimum price on all milk sold within the state, including milk produced out-of-state, which raises funds to pay local dairy farmers the increased minimum price by imposing an assessment on the sale of all milk, including milk produced outside the state, outweigh the law's benefit of protecting local dairy farmers, within the meaning of this Court's decision in *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970)?

LIST OF PARTIES

The petitioners are West Lynn Creamery, Inc. ("West Lynn") and LeComte's Dairy, Inc. ("LeComte's").¹ The respondent is Jonathan Healy, the present Commissioner of the Massachusetts Department of Food and Agriculture, who is substituted for Gregory Watson, the former Commissioner of the Massachusetts Department of Food and Agriculture, pursuant to Supreme Court Rule 35.3.

¹ Pursuant to Supreme Court Rule 29.1, the petitioner West Lynn Creamery, Inc. states that it is a privately held corporation with no subsidiaries. West Lynn Creamery, Inc. is wholly-owned by Scangas Brothers Holdings, Inc. Scangas Brothers Holdings, Inc. also wholly-owns Richdale Stores, Inc. and West Lynn Creamery Realty Corp.

The petitioner LeComte's Dairy, Inc. is a privately held corporation with no parent companies, subsidiaries, or affiliated corporations.

TABLE OF CONTENTS

Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Regulations Involved	2
Statement of the Case	3
I. Federal Regulation of the Milk Industry	3
II. The Pricing Order	6
Summary of the Argument	10
Argument	14
The Massachusetts Pricing Order Discriminates Against Interstate Commerce	14
I. The Pricing Order is a <i>Per Se</i> Violation of the Commerce Clause Because it is Both Discriminatory in Purpose and Effect	16
A. The Pricing Order has the Same Discriminatory Purpose as the Statute in <i>Baldwin</i>	19
B. The Secondary Purpose Asserted by the Commonwealth, That the Pricing Order Ensures a Fresh Supply of Milk, Does Not Justify Discriminating Against Interstate Commerce	21
C. The Pricing Order is Discriminatory in Effect	23
D. The Pricing Order is Not a Limited Regulation of Intrastate Commerce	26
E. The Pricing Order is Not a Constitutional Use Tax Under <i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	27

TABLE OF CONTENTS.

F. The Pricing Order is Not a Constitutional Subsidy	28
II. The Pricing Order Violates the Commerce Clause Because its Burdens on Interstate Commerce Outweigh Any In-State Benefits	31
Conclusion	33

TABLE OF AUTHORITIES

CASES.

<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	11, 19n, 20, 21
<i>Baldwin v. G.A.F. Seelig</i> , 294 U.S. 511 (1935)	passim
<i>Block v. Community Nutrition Institute</i> , 467 U.S. 340 (1984)	4
<i>Boston Stock Exchange v. State Tax Comm'n</i> , 429 U.S. 318 (1977)	27
<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority</i> , 476 U.S. 573 (1986)	passim
<i>Chemical Waste Management, Inc. v. Hunt</i> , 112 S.Ct. 2009 (1992)	22
<i>Farmland Dairies v. McGuire</i> , 789 F.Supp. 1243 (S.D.N.Y. 1992)	19n, 28
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	13, 27, 28
<i>H.P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	15, 20, 22
<i>Hughes v. Alexander Scrap Corp.</i> , 426 U.S. 794 (1976)	29n
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	15, 16
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977)	17, 20, 24

TABLE OF AUTHORITIES CITED.

<i>Lehigh Valley Coop v. United States</i> , 370 U.S. 76 (1962)	5
<i>Maine v. Taylor</i> , 447 U.S. 131 (1986)	32
<i>Marigold Foods et al. v. Redalin</i> , No. 4-92-1084, slip op. 1993 U.S. Dist. LEXIS 15019 (D.Minn. October 20, 1993)	19n
<i>Marigold Foods v. Redalin</i> , 809 F.Supp. 714 (D. Minn. 1992)	19n
<i>Milk Board v. Eisenberg Co.</i> , 306 U.S. 346 (1939)	12, 13, 26, 27
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	16, 32
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	4, 17n
<i>New Energy Co. of Indiana v. Limbach</i> , 486 U.S. 269 (1988)	14, 28, 29n, 31
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	16, 20, 22
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	ii, 13, 17, 31, 32
<i>Polar Ice Cream & Creamery Co. v. Andrews</i> , 375 U.S. 361 (1964)	20
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	29, 30
<i>West Lynn Creamery, Inc. v. Commissioner of Department of Food and Agriculture</i> , 415 Mass. 8, 611 N.E.2d 239 (1993)	10, 19n, 20, 24, 25
<i>White v. Massachusetts Council of Construction Employees, Inc.</i> , 460 U.S. 204 (1983)	29
<i>Wyoming v. Oklahoma</i> , 112 S.Ct. 789 (1992)	14, 16, 17, 22

TABLE OF AUTHORITIES CITED.

STATUTES AND RULES

Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601, <i>et seq.</i>	4
7 U.S.C. § 608c	4
7 U.S.C. § 608c(5)(A)	5
7 U.S.C. § 608c(5)(B)(ii)	5
7 U.S.C. § 608c(5)(G)	6
7 U.S.C. § 608c(18)	5
28 U.S.C. § 1257(a)	2
United States Supreme Court Rule 35.3	ii
United States Supreme Court Rule 29.1	ii

REGULATIONS

The Amended Pricing Order, Dated February 26, 1992	6n
New England Federal Milk Marketing Order No. 1	4
7 C.F.R. § 1001.40	5

UNITED STATES CONSTITUTION

Article 1, Section 8, cl. 3	2
-----------------------------	---

MISCELLANEOUS

58 Fed. Reg. 12634 (1993)	12, 21n
56 Fed. Reg. 58972 (1992)	12, 21n
55 Fed. Reg. 50934 (1991)	12, 21n
Agricultural Marketing Service, U.S. Department of Agriculture, <i>The Federal Milk Marketing Order Program</i> , Marketing Bulletin No. 27 (1990)	4

TABLE OF AUTHORITIES CITED.

<i>The Federalist</i> , Nos. 7 and 11 (Hamilton, A.)	15n
Collins, <i>Economic Union as a Constitutional Value</i> , 63 N.Y.U.L.R. 43 (1988)	14n, 30n
Regan, <i>The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause</i> , 84 Mich. L. Rev. 1091 (1986)	15n, 28n
Smith, <i>State Discriminations Against Interstate Commerce</i> , 74 Calif. L. Rev. 1203 (1986)	27n
Varat, <i>State "Citizenship" and Interstate Equality</i> , 48 U. Chi. L. Rev. 487 (1981)	30n

No. 93-141

**In the
Supreme Court of the United States**

October Term, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The Opinion of the Massachusetts Supreme Judicial Court is reported at 415 Mass. 8, 611 N.E.2d 239 (1993) and is reprinted in the Joint Appendix at JA118.² The Order of the Massachusetts Supreme Judicial Court staying the issuance of its rescript pending this Court's determination of the constitutionality of a pricing order is unreported and is reprinted at

²Citations to material printed in the Joint Appendix appear as "JA___."

JA131. The Order of the Massachusetts Appeals Court enjoining the Commissioner from revoking the Petitioners' milk dealers' licenses is unreported and is reprinted at JA113. The opinion of the Massachusetts Superior Court denying the Petitioners' Second Motion for a Preliminary Injunction is unreported and is reprinted at JA108. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking West Lynn's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at JA84. The Decision of the Commissioner of the Massachusetts Department of Food and Agriculture revoking LeComte's milk dealer's license for failure to comply with a pricing order is unreported and is reprinted at JA91.

JURISDICTION

The Opinion of the Massachusetts Supreme Judicial Court, the highest state court in Massachusetts, was entered on April 15, 1993. (JA9,118). The Massachusetts Supreme Judicial Court held that a milk pricing order, issued by the Commissioner of the Massachusetts Department of Food and Agriculture, did not violate the Commerce Clause of the United States Constitution. (JA118). No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Petition for a Writ of Certiorari was filed on July 14, 1993, and granted on October 4, 1993.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Article 1, Section 8 of the Constitution of the United States provides in pertinent part as follows:

The Congress shall have the Power . . . To Regulate Commerce with foreign Nations, and among the several States. . . .

The Amended Pricing Order issued by the Commissioner of the Massachusetts Department of Food and Agriculture is reprinted at JA32.

STATEMENT OF THE CASE

The Petitioners, West Lynn and LeComte's, are Massachusetts licensed milk dealers¹ who sell milk and related dairy products on the wholesale level in New England. (JA45). Approximately ninety-seven percent of West Lynn's and LeComte's milk is purchased from dairy farmers in New York and Maine; less than three percent of their milk is purchased from Massachusetts dairy farmers. (JA49). West Lynn and LeComte's purchase their milk from out-of-state dairy farmers who compete with Massachusetts dairy farmers. (JA66). West Lynn and LeComte's compete with other milk dealers, some of whom purchase a substantially larger percentage of their milk from Massachusetts dairy farmers. (JA59).

I. Federal Regulation of the Milk Industry

Milk that is produced by dairy farmers in one state is often sold to milk dealers in another. (JA46-47). To reduce the risk that interstate rivalries may jeopardize the free flow of a fresh supply of milk, the federal government regulates the marketing

¹ Milk dealers are also referred to as milk wholesalers or milk processors.

of dairy products throughout most of the United States. (JA46). In 1937, responding to intense competition between dairy farmers in various states, the Agricultural Marketing Agreement Act (the "Act") 7 U.S.C. §§ 601 *et seq.*, was passed. The Act authorizes the Secretary of Agriculture (the "Secretary") to issue milk marketing orders setting minimum prices that milk dealers, such as the Petitioners, must pay to dairy farmers for their milk. *Block v. Community Nutrition Institute*, 467 U.S. 340, 341-342 (1984) citing 7 U.S.C. § 608c. The essential purpose of the Act is to raise producer prices to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers in each state in each region of the country. *Block v. Community Nutrition Institute*, 467 U.S. at 342 citing S. Rep. No. 1011, 74th Cong. 1st Sess. 3 (1935) and *Nebbia v. New York*, 291 U.S. 502, 517-518 (1934).

Typically, marketing areas covered by the federal marketing orders encompass several states. Each area is designed to include milk distributors who compete with each other in a particular milk market. See Agricultural Marketing Service, U.S. Department of Agriculture, *The Federal Milk Marketing Order Program*, Marketing Bulletin No. 27 at 19 (1990). For many years, the Secretary has issued and enforced one milk marketing order for virtually all of New England — New England Federal Milk Marketing Order No. 1 ("Order No. 1"). (JA46). The Order No. 1 marketing area includes most of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire. (JA46).

The Act's minimum price regulation across state lines reflects the interstate nature of commerce in the milk industry. (JA46-47). Throughout the United States, milk is regularly exported from rural dairy production areas into the more densely populated urban states. Of the six New England states, only the two most sparsely populated — Vermont and Maine —

are "export states." (JA46-47). Dairy farmers within those two states produce far more milk than is consumed there. The excess milk is exported across state lines and sold to milk dealers, such as the Petitioners, who package milk for consumers in the more densely populated New England states. (JA46-47). Massachusetts is an import state: it only produces a small fraction of all of the dairy products,⁴ and ten percent of the fluid milk, sold in the state. (JA66).

The Federal Orders establish, among other things, the minimum prices that milk dealers must pay for milk purchased from dairy farmers. Under this pricing system, milk is divided into three classes based upon the form in which it is used: Class I is primarily fluid milk; Class II includes products such as yogurt and ice cream; and Class III includes products such as butter, cheese, and powdered milk. 7 U.S.C. § 608c(5)(A); 7 C.F.R. § 1001.40. Under the federal system, each class of milk is assigned a minimum price.

Milk dealers pay for milk based upon how they use it. Each dairy farmer, however, receives a uniform minimum price for his or her milk, regardless of how the milk is ultimately used by the dealer. This is achieved by pooling the proceeds of milk for all three classes and distributing to producers an average of the three prices, referred to as the "blend" price. 7 U.S.C. § 608c(5)(B)(ii).

In setting minimum prices, the Secretary must consider economic conditions in *all* production areas and consuming centers serving the regulated region. *Lehigh Valley Coop. v. United States*, 370 U.S. 76, 91-98 (1962); 7 U.S.C. § 608c(18). No provision in a marketing order may favor dairy

⁴ At one point in the record below, in support of an Emergency Motion for a Preliminary Injunction, it was represented that thirty-five percent of all of the dairy products sold in Massachusetts are produced in Massachusetts. (JA66). This figure was reported in error. The actual percentage is considerably less than thirty-five percent.

farmers in one state over dairy farmers in other states. 7 U.S.C. § 608c(5)(G).

Nothing in the Act expressly precludes a state from supporting its dairy farmers. Nor does the Act expressly preclude a state from setting minimum prices within the state above the federal minimum price.

II. The Pricing Order

On January 28, 1992, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner") issued a Pricing Order. (JA32).⁵ The Pricing Order was promulgated after a series of hearings conducted by a Special Commission appointed by the Governor to investigate and study the Massachusetts dairy industry. (JA11, 26-27). After its investigation, the Special Commission issued a Report (the "Report") (JA10) and determined that the Massachusetts dairy industry was "slowly being overrun by big business in the larger milk producing states in the mid-west." (JA13).

The Special Commission also determined that the Federal minimum price that Massachusetts dairy farmers receive for their milk "does not reflect the significantly higher costs of maintaining an agricultural enterprise in this area of the country, particularly since the industry in the [Minnesota-Wisconsin] region consists largely of 'factory farms,' with huge herds, vast acreage and the ready availability of both supplies and labor, as opposed to New England, where small, family operations are the rule." (JA15). The Special Commission, therefore, recommended that minimum prices to be paid to Massachusetts dairy farmers should be "increased to stabilize milk prices and ensure the viability of the Massachusetts dairy indus-

⁵ The Pricing Order was subsequently amended on February 26, 1992. (JA32).

try." (JA23). Without such measures, the Special Commission concluded, "our milk will [have to] be trucked in from other states like Pennsylvania and Ohio." (JA18).

Following the issuance of the Special Commission's Report,⁶ the Commissioner declared the existence of a state of emergency in the Massachusetts dairy industry.⁷ (JA25-31). The essence of the declaration is that Massachusetts dairy farmers are selling their farms and going out of business because they cannot compete successfully with dairy farmers in other states. (JA25-31). Upon the basis of this declaration and the referenced Special Commission Report, the Commissioner promulgated the Pricing Order. (JA30-31,32).

The Pricing Order is a three-part regulatory scheme. First, it establishes a minimum price "to be paid by milk dealers to Massachusetts producers above the federally established minimum milk price." (JA32). The Commissioner then established the target price at \$15.00 per hundredweight (cwt). (JA32, 35). The \$15.00/cwt figure was derived from testimony

⁶ The Commissioner relied extensively on the Special Commission's Report in determining that a "State of Emergency" existed with respect to the Massachusetts dairy farmers. (JA25-31). The Commissioner stated:

In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein . . .

(JA26-27). The Commissioner concluded that since the Report was issued, "little has changed to improve the situation confronting these farmers." (JA27).

⁷ In his declaration, the Commissioner stressed "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." (JA29). The Commissioner concluded:

In order to alleviate the situation facing our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England.

(JA30).

given by Massachusetts dairy farmers to the Special Commission at public hearings held on May 6 and 7, 1991. (JA12,21, 23,27). This was the price that the Massachusetts dairy farmers said that they wanted. (JA20-22).

Two problems were created when the Commissioner concluded that he wanted to protect Massachusetts dairy farmers by guaranteeing them a minimum price of \$15.00/cwt. First, he had to find a way to provide funds to pay the farmers more than the federal price. (JA35-37). His second problem was that milk dealers would naturally be inclined to buy lower priced raw milk from farmers in neighboring states selling at less than \$15.00/cwt — which had in fact been the situation in the past. (JA10-24). Responding to these problems, the Commissioner, therefore, designed a regulatory pricing scheme which would permit local dairy farmers to benefit from the higher price without suffering the market consequences of charging a higher price. (JA32-40).

The Pricing Order's structure is cumbersome by design.⁸ First, the Pricing Order establishes the \$15.00/cwt minimum price to be received by Massachusetts farmers, but not out-of-state farmers, for the milk Massachusetts farmers produce. (JA35-37). Second, the Pricing Order establishes a funding source — an assessment imposed on all Class I milk sold by milk dealers in Massachusetts. (JA35-36). This assessment is not paid by the milk dealers directly to the Massachusetts farmers.

⁸ Although cumbersome by design, the Pricing Order may be simply described. If the Federal blend price were \$12.00/cwt (*see infra* note 9 for a mathematical description), \$1.00 is payable to Massachusetts dairy farmers through the Fund on milk sold in Massachusetts whether it is: 1) Massachusetts produced milk bottled by a Massachusetts dealer; 2) out-of-state produced milk bottled by a Massachusetts dealer; 3) Massachusetts produced milk bottled by an out-of-state dealer; or 4) out-of-state milk bottled by an out-of-state dealer. Massachusetts dairy farmers will actually receive \$3.00/cwt for their milk production (*see infra* note 9), whether their milk is sold in-state or out-of-state or whether it is used for Class I (bottled) or Class II or Class III (manufactured dairy products) purposes.

Instead, the Pricing Order requires milk dealers, whether located in or out of the Commonwealth, to pay monthly assessments to the Commissioner based on the amount of Class I milk each sells for consumption in Massachusetts, even if the milk dealer purchased its raw milk from out-of-state dairy farmers. (JA35-36). The assessment paid by each milk dealer is based on one-third of the difference between \$15.00/cwt and the federal blend price for milk, multiplied by the amount of Class I milk the dealer sold in Massachusetts during the previous month. (JA35-36).⁹

The assessments collected by the Commissioner are not deposited into the General Fund of the Commonwealth of Massachusetts. (JA35). Instead, the Commissioner deposits the assessments into a separate trust fund, the Massachusetts Dairy Equalization Fund (the "Fund"). (JA35). On the fifth day of the following month, the amounts paid into the Fund are distributed to Massachusetts dairy farmers based on each farmer's pro-rata share of the milk produced in the state. (JA36).¹⁰

⁹ Assuming that the federal blend price were \$12.00, the milk dealer's assessment would be \$1.00 (\$15.00 minus \$12.00, divided by three). (JA35-36). This \$1.00 is then multiplied by the amount of Class I milk per hundredweight (cwt) the milk dealer sold in Massachusetts that month. (JA35-36). Continuing this example, assume that a milk dealer sold 100,000 cwt of Class I milk in Massachusetts. The milk dealer's assessment payment for that month would be \$100,000.00. While assessment payments under the Pricing Order are calculated by subtracting the federal blend price from the \$15.00 minimum price and then dividing by three (JA35), Massachusetts farmers will nonetheless receive \$15.00/cwt for the milk they produce. A divisor of three is used because Massachusetts has determined that Massachusetts milk production is one-third of fluid milk consumption in the state. Therefore, in this example, a \$1.00/cwt assessment on dealers will produce \$3.00 for Massachusetts dairy farmers.

¹⁰ The Massachusetts farmers receive monthly distributions from the Fund based on "their proportion of milk produced in Massachusetts." (JA36). Thus, if Farmer A produced 100,000 cwt of milk and the total amount produced by Massachusetts farmers were 1,000,000 cwt of milk, Farmer A would have produced 10% of the milk produced in Massachusetts. He would therefore be entitled to 10% of the total amount in the Fund. Assuming that \$1,000,000.00 is in the Fund, Farmer A would receive \$100,000.00. (JA36).

It is significant that although most of the money paid into the Fund is derived from the sale of out-of-state milk, out-of-state dairy farmers receive no distribution of monies from the Fund. (JA36,66). During the months of May through September, 1992, the Massachusetts dairy farmers received approximately \$3 Million from the Fund. (JA82). Because 90% of the fluid milk sold in Massachusetts is imported from out-of-state (JA66), \$2.7 Million of the \$3.0 Million distributed to Massachusetts farmers was generated directly from the sale of out-of-state milk. The purpose of this transfer of millions of dollars was, as stated by the Commissioner in his Declaration, to bolster the economic position of Massachusetts dairy farmers, and to reduce competition from the more efficient dairy farmers in other states. (JA11,13,15).

From the time the Pricing Order was promulgated, the Petitioners have believed that the Massachusetts regulatory scheme, the Pricing Order, discriminates against interstate commerce. Because the Petitioners purchase virtually all of their milk from out-of-state farmers (JA49) and these out-of-state farmers are being required by Massachusetts to use their milk as a revenue source for improving the economic position of Massachusetts farmers who are their competitors, the Petitioners instituted this civil rights action in the Massachusetts Trial Court. (JA44).¹¹

SUMMARY OF THE ARGUMENT

The Massachusetts Pricing Order discriminates against interstate commerce. It promotes precisely the kind of economic warfare among the states that the Framers of the Constitution

¹¹The full procedural history appears at *West Lynn Creamery, Inc. et al. v. Commissioner of Department of Food and Agriculture*, 415 Mass. at 12-14, 611 N.E.2d at 241 (JA22-25).

sought to eliminate. The dormant Commerce Clause promotes economic unity. The Pricing Order causes disunity by favoring local industry at the expense of out-of-state industry: it categorically discriminates against interstate commerce in violation of the Commerce Clause.

This Court has concluded that a state law violates the Commerce Clause when it is discriminatory in purpose or effect. State laws that are protectionist in purpose or that seek to mitigate the consequences of competition by industry in other states have been held to violate the Commerce Clause. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 580 (1986) citing *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 528 (1935). The leading case in the area is *Baldwin*. *Baldwin* involved a New York law which established a minimum price for in-state and out-of-state milk. *Baldwin*, 294 U.S. at 519-520. The purpose of the law was to insulate New York farmers from the economic consequences of lower priced out-of-state milk. *Id.* This Court held the New York law unconstitutional both because of its purpose and its effect — removing the economic incentive for a local dealer to purchase out-of-state milk. The Pricing Order involved in this case is similar to the New York law in *Baldwin*: both have a protectionist purpose and both eliminate the competitive advantage that out-of-state producers have over in-state producers.

Massachusetts has argued that its purpose in promulgating the Pricing Order was to "aid" the Massachusetts dairy farmer. (JA128). In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), however, this Court held that aiding an in-state industry is not sufficient to save a state law that is being challenged under the Commerce Clause. The Commerce Clause inquiry does not depend upon whether one focuses on the benefitted or the burdened party. *Id.* at 273.

Massachusetts has also argued that the Pricing Order seeks to ensure a fresh and adequate supply of milk to Massachusetts consumers and that this purpose protects the Pricing Order from a Commerce Clause challenge. (JA29). This argument is contrived to help save the Pricing Order. Indeed, the Secretary of Agriculture has concluded in each of the past three years that the supply of milk being produced for Massachusetts consumers is adequate. See 58 Fed. Reg. 12634, 12647-12648 (1993); 56 Fed. Reg. 58972 (1992); 55 Fed. Reg. 50934 (1991). In any case, the *Baldwin* court rejected this exact argument holding that states must employ non-discriminatory means to accomplish purposes that might otherwise be within their police power. *Baldwin*, 294 U.S. at 522-523.

The Pricing Order does not have a constitutionally permissible purpose and it has a discriminatory effect. *Id.* It stifles out-of-state competition, as did the New York law in *Baldwin*. *Id.* at 527. In this case, as in *Baldwin*, the states have sought to insulate in-state dairy farmers by establishing a minimum price to be paid by milk dealers on all milk no matter where it was produced — in-state or out-of-state. *Id.* In this case, the Pricing Order has a greater discriminatory effect than the New York law in *Baldwin*. In *Baldwin*, the Vermont farmers received the minimum state price; in Massachusetts, the out-of-state farmers not only do not receive the minimum state price, out-of-state milk is used to pay local farmers a price that is greater than what they would otherwise receive. Thus, the Pricing Order is less “even handed” than the New York law scrutinized in *Baldwin*. In any case, the *Baldwin* Court held, notwithstanding that less discriminatory context, that the appearance of even-handedness is not sufficient to protect an otherwise discriminatory law from a Commerce Clause challenge.

The State’s reliance on *Milk Board v. Eisenberg*, 306 U.S. 346 (1939) is inapposite. *Eisenberg* involved a Pennsylvania

law that established a minimum price that Pennsylvania dealers were required to pay to Pennsylvania dairy farmers. The Pennsylvania law in no way affected the prices paid to out-of-state farmers as does the Pricing Order. The Pennsylvania law also did not seek to raise money from the sale of out-of-state milk to provide economic assistance to in-state farmers. That assistance is, however, one of the burdens created by the Massachusetts Pricing Order. Thus, *Eisenberg* involved a Pennsylvania law which principally affected intrastate commerce. On the other hand, this case involves a law with a demonstrated interstate effect which is discriminatory.

The State’s reliance on *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) is inapposite. *Henneford* involved Washington’s efforts to level the playing field by imposing a use tax to equal the sales tax imposed on the sale of local goods. This Court held that the purpose of the Washington law, to equalize the tax burdens, did not burden interstate commerce. This case does not involve a state effort to remove a tax disadvantage; it involves a state effort to protect a local industry from a competitive disadvantage.

The Pricing Order is not a subsidy. The Order itself says that it “sets a target minimum price to be paid by milk dealers to Massachusetts producers.” (JA32). In fact, the Commissioner never uses the word subsidy in his Order. He now seeks to call it a subsidy, but this is an after the fact rationale. The Pricing Order has none of the characteristics of a subsidy: it is not funded by state revenues that are raised by taxing state residents who have voted for legislators who have approved the tax and the expenditure.

If this Court were to analyze the Pricing Order under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), it would also conclude that the Pricing Order violates the Commerce Clause. The local purpose, driven by protectionism, does not compare to the excessive burden on interstate commerce. In addition,

the State has not shown that there are no other alternatives for helping Massachusetts dairy farmers other than the discriminatory scheme that has been put into effect by the Commissioner through his Pricing Order.

ARGUMENT

The Massachusetts Pricing Order Discriminates Against Interstate Commerce

The Commerce Clause explicitly grants power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States. . ." U.S. Const. art. I, § 8, cl. 3. A basic purpose of the Commerce Clause is to prevent states from discriminating against foreign commerce, including out-of-state commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274 (1988). As this Court has reiterated on many occasions, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) quoting *Limbach*, 486 U.S. at 273-274.

This Court's rationale in shaping the dormant Commerce Clause is rooted in history.¹² After all, economic warfare among the states convinced the Framers that:

[I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization

¹² See, e.g., Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U.L.R. 43 (1988). Professor Collins notes, "[s]ince early in the nineteenth century the Supreme Court has promoted economic union by invalidating state laws that were hostile to" the Commerce Clause. *Id.*

that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-534 (1949).¹³

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.*, [294 U.S. 511, 527 (1935)] "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. at 537-538 citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 527.¹⁴

The Massachusetts Pricing Order violates the principle of economic unity that has been historically promoted by this

¹³ See also, *The Federalist*, Nos. 7 and 11, where Hamilton cited the potential dangers of commercial rivalry amongst the States as being reasons for ratifying the Constitution.

¹⁴ See also, Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). Summarizing the "conventional wisdom" regarding the historical underpinnings of the Commerce Clause, Professor Regan notes, "[t]he people who wrote our actual Constitution in 1787 were well aware" of the danger of state protectionism. "They saw states enacting protectionist restrictions; they saw other states retaliating; and they feared not merely for the economic health, but also and even more for the political viability of the infant United States." *Id.* at 1114.

Court. The Pricing Order, stripped of its formulas and details, is a state law that blatantly promotes local industry at the expense of out-of-state industry. It promotes local industry by boosting the minimum price of milk to a level recommended by that local industry, it provides funding for the increased minimum price almost entirely from the sale of out-of-state milk, and it prevents out-of-state industry from underselling local industry by imposing an assessment on all milk wherever the source is located. In other words, this state Pricing Order violates the basic purpose of the dormant Commerce Clause: it categorically discriminates in favor of local businesses and against directly competing out-of-state businesses. *Hughes v. Oklahoma*, 441 U.S. at 336-337.

I. The Pricing Order Is a Per Se Violation of the Commerce Clause Because it is Both Discriminatory in Purpose and Effect.

This Court follows a two-step analysis in determining whether a state law or regulation violates the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. at 578-579; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). If a state statute or regulation is discriminatory either in purpose or effect, then this Court has applied a *per se* rule of invalidity. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) citing *H.P. Hood & Sons, Inc.*, 336 U.S. at 525 and *Baldwin*, 294 U.S. at 521. Such discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives. *Wyoming v. Oklahoma*, 112 S. Ct. at 800.

On the other hand, where the state law regulates even-handedly, to effectuate a legitimate local purpose, and its effects on

interstate commerce are only incidental, the state law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Here, this Court need not apply the second step in the analysis because the Pricing Order is discriminatory both in purpose and effect, and, therefore, the *per se* rule of invalidity should be applied.

This Court has held that state regulations that amount to "simple economic protectionism" are *per se* violations of the Commerce Clause. *Wyoming v. Oklahoma*, 112 S. Ct. at 800. An example of such economic protectionism includes state statutes or regulations which are designed to mitigate the consequences of competition between the states. *Brown-Forman Distillers Corp.*, 476 U.S. at 580 citing *Baldwin*, 294 U.S. at 528. See also, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977).

The seminal case restricting the states' powers to regulate interstate commerce is *Baldwin*. In *Baldwin*, this Court held that a state, in the interest of protecting its dairy farmers, could not insulate its in-state milk industry from competition from other states. *Baldwin*, 294 U.S. at 527-528. There, New York had established minimum milk prices to be paid by milk dealers to producers. *Id.* at 519-520. For products originating within the state, this Court did not take issue with New York's minimum price law. *Id.* at 519.¹⁵ Instead, it focused on that portion of the New York law which fixed a minimum price for milk imported from other states. *Id.* The New York statute required milk dealers to pay the New York minimum price to out-of-state producers if the milk dealer wanted to sell its milk in New York. *Id.*

New York included milk produced in other states within its minimum price laws to insulate local farmers from competition

¹⁵ The Petitioners do not contest the state's power to fix minimum prices for milk produced and sold within the state. Such regulations have been held to be constitutionally valid. See *Nebbia v. New York*, 291 U.S. at 502.

from neighboring states. *Id.* Without that portion of the law, New York milk dealers would have been encouraged to buy their milk out-of-state to avoid paying the artificially high in-state milk prices created by the statute. *See id.* at 519-520. In other words, New York artificially raised the price of out-of-state milk, as well as in-state milk, so that out-of-state producers could not underprice the local product. *See id.*

The *Baldwin* Court struck down New York's statutory scheme because the law unconstitutionally removed any economic incentive for a local dealer to purchase out-of-state milk. *Id.* at 522-523. This Court reasoned that out-of-state milk producers were denied an opportunity to compete with New York produced milk and concluded:

The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition.

Id. at 527.

Like the statute in *Baldwin*, the Pricing Order was designed to isolate the Massachusetts dairy farmers from competition from other states, and has the effect of eliminating the competitive advantage that out-of-state producers have over Massachu-

setts producers.¹⁶ Indeed, the barrier created by the Pricing Order has a more substantial discriminatory effect¹⁷ than the statute in *Baldwin*.¹⁸

A. The Pricing Order Has the Same Discriminatory Purpose as the Statute in *Baldwin*.

As previously discussed, Massachusetts' purpose in enacting the Pricing Order was economic protectionism and discrimination against out-of-state competition in the Massachusetts milk market.¹⁹ The Report of the Special Commission, expressing its concern that Massachusetts farmers were "slowly being overrun by big business in the larger milk producing states in the mid-west," is the most revealing evidence of Massachusetts' protectionist purpose. (JA13).

¹⁶ The Massachusetts court assumed, without deciding, that the Petitioners, as milk dealers, had standing to raise this constitutional challenge to the Pricing Order. *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d at 244 (JA127-128). This Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 263, however, makes it clear that the Petitioners have standing to challenge the Pricing Order. There, this Court rejected the argument that wholesalers did not have standing to challenge an excise tax on Commerce Clause grounds, despite the fact that the wholesalers had passed on some of the tax to their customers. *Id.* at 267. First, this Court noted that the wholesalers were liable for the tax. Second, this Court stated that "even if the tax is completely and successfully passed on, it increases the price of their products. . . ." *Id.* This Court reasoned "[a]lthough they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.* Thus, this Court concluded that the "wholesalers plainly have standing to challenge the tax. . . ." *Id.* Since the Petitioners, like the wholesalers in *Bacchus*, are responsible for making the assessment payments under the Pricing Order, the Petitioners plainly have standing to challenge its constitutionality.

¹⁷ The fact that the Pricing Order is more economically harmful to out-of-state farmers, and those who deal with them, is further discussed *infra* at pp. 23-25.

¹⁸ Three Federal District Court decisions, relying on *Baldwin*, recently struck down state milk pricing schemes substantially similar to the Pricing Order, holding that the regulations were *per se* violations of the Commerce Clause. *Marigold Foods et al. v. Redalin*, No. 4-92-1084, slip op. 1993 U.S. Dist. LEXIS 15019 (D. Minn. October 20, 1993); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Marigold Foods v. Redalin*, 809 F. Supp. 714 (D. Minn. 1992).

¹⁹ See *supra* pp. 6-8 and accompanying notes.

This Court has consistently struck down as violative of the Commerce Clause state statutes and regulations with purposes identical to the purpose of the Pricing Order. See *Limbach*, 486 U.S. at 269; *Brown-Forman Distillers Corp.*, 476 U.S. at 573; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 263; *Philadelphia v. New Jersey*, 437 U.S. at 617; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 333; *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *H.P. Hood & Sons v. Du Mond*, 336 U.S. at 525; *Baldwin*, 294 U.S. at 519. State parochialism designed to discriminate against interstate commerce in favor of local interests is foreclosed by *Baldwin*. See also, *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. at 361; *H.P. Hood & Sons v. Du Mond*, 336 U.S. at 525. Despite the fact that the Pricing Order has a clear protectionist purpose, the State has argued that the Pricing Order is not a protectionist measure, since it was designed to "aid" Massachusetts farmers "to save [the] industry from collapse." *West Lynn Creamery, Inc.*, 415 Mass. at 17, 611 N.E.2d at 244 (JA128). This Court, however, has held "it is irrelevant to the Commerce Clause inquiry whether the motivation of the legislature was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Bacchus*, 468 U.S. at 273. In *Bacchus*, Hawaii imposed an excise tax on sales of liquor at the wholesale level. A locally produced Hawaiian wine was exempted from the excise tax. *Id.* at 265. Although the tax was discriminatory on its face, Hawaii argued that the tax was not protectionist because it was not enacted to discriminate against out-of-state goods, but rather to promote the local wine industry. *Id.* at 273. This Court rejected Hawaii's argument, concluding that the determination of constitutionality does not depend upon whether one focuses on the benefited or the burdened party. *Id.* The *Bacchus* Court also noted that "the propriety of economic protectionism may not be allowed to

hinge upon the State's . . . characterization of the industry as either 'thriving' or 'struggling.'" *Id.* The *Bacchus* Court reasoned:

[W]e perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises. . . In either event, the legislation constitutes "economic protectionism" in every sense of the phrase.

Id. at 272. Accordingly, Massachusetts' characterization of the Pricing Order as a measure designed to "aid" Massachusetts farmers, rather than harm out-of-state farmers, cannot save the Pricing Order from constitutional infirmity.

B. The Secondary Purpose Asserted by the Commonwealth, that the Pricing Order Ensures a Fresh Supply of Milk, Does Not Justify Discriminating Against Interstate Commerce.

The State has argued that a secondary purpose of the Pricing Order is to insure an adequate supply of milk to the Commonwealth, the supply having supposedly been put in jeopardy because the Massachusetts farmers are unable to earn an adequate income.²⁰ This argument, however, is foreclosed by

²⁰ This secondary purpose is plainly contrived to justify the Pricing Order's real purpose — to protect the Massachusetts farmers from competition. (JA10-24). Controverting the Commissioner's findings of threatened supply, the United States Secretary of Agriculture has frequently addressed the New England supply issue. His most recent conclusions were published in 1991, 1992, and 1993. 58 Fed. Reg. 12634, 12647-12648 (1993); 56 Fed. Reg. 58972 (1992); 55 Fed. Reg. 50934 (1991). On each occasion his conclusion was the same: the federal order prices established for New England were adequate to "insure a sufficient supply of pure and wholesome milk" for the market. 58 Fed. Reg. 12634, 12674 (1993).

Baldwin. See *Wyoming v. Oklahoma*, 112 S. Ct. at 802 citing *Baldwin*, 294 U.S. at 511 and *H.P. Hood & Sons, Inc.*, 336 U.S. at 525. In *Baldwin*, this Court made it clear that the evil of protectionism can reside in legislative means as well as legislative ends. *Baldwin*, 294 U.S. at 522-523. In fact, this Court recently noted, “[w]e have often examined a ‘presumably legitimate goal,’ only to find that the State attempted to achieve it by the ‘illegitimate means of isolating the State from the national economy.’” *Wyoming v. Oklahoma*, 112 S. Ct. at 802 quoting *Philadelphia v. New Jersey*, 437 U.S. at 627. See also, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992). Indeed, in *Baldwin*, this Court specifically held that legitimate state power to regulate commerce for health and safety reasons could not be invoked to validate an otherwise discriminatory statute. *Baldwin*, 294 U.S. at 522-523. There, this Court did not accept state arguments concerning the preservation of the quality of milk as a guise for the protection of the economic welfare of the state’s dairy farmers. The *Baldwin* Court stated:

If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . . Economic welfare is always related to health for there can be no health if men are starving.

Id. See also, *H.P. Hood & Sons*, 336 U.S. at 538 (“the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition”). The *Baldwin* Court concluded that despite the purported legitimate

local purpose of the New York statute, it was unconstitutional because it “neutralize[d] the economic consequences of free trade among the states.” *Baldwin*, 294 U.S. at 527.

As discussed below, the effect of the Pricing Order, like the statute in *Baldwin*, is to economically isolate Massachusetts dairy farmers from the national economy. Therefore, as in *Baldwin*, the State cannot save the discriminatory Pricing Order by claiming that the end to be served is legitimate. As the *Baldwin* court warned, “[t]o give entrance to that excuse would be to invite a speedy end to our national solidarity.” *Id.* at 523.

C. The Pricing Order is Discriminatory in Effect.

The Pricing Order is also discriminatory in effect. Like the statute in *Baldwin*, the Pricing Order establishes “a minimum price to be paid by milk dealers to Massachusetts producers” for both the purchase of in-state and out-of-state milk. (JA32). The Pricing Order achieves this minimum price by requiring milk dealers to pay an assessment — one-third of the difference between \$15.00/cwt and the federal blend price — into the Fund. (JA32,35). Because the assessment is imposed on all milk sold in Massachusetts, milk dealers must pay the minimum Massachusetts price for all milk, including milk purchased out-of-state. (JA36). By establishing a minimum price for both in-state and out-of-state milk, the Pricing Order effectively cancels out the economic advantage that lower-priced, non-Massachusetts milk would otherwise have over milk produced in Massachusetts. The Pricing Order, therefore, denies out-of-state milk an opportunity to compete with in-state milk because out-of-state milk is subject to the additional payment if it is sold in Massachusetts. This is precisely the discriminatory effect prohibited by *Baldwin*. See also, *Brown-Forman Distillers Corp.*, 476 U.S. at 580 citing *Baldwin*, 294 U.S. at 528 (state “may not insist that producers or consumers in other states surrender whatever competitive advantages they may possess”).

Despite the striking similarities between the Pricing Order and the statute in *Baldwin*, Massachusetts has argued, and the Massachusetts court agreed, that the Pricing Order is not a *per se* violation of the Commerce Clause. The Massachusetts court reasoned that the Pricing Order is "evenhanded in its application" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund." *West Lynn Creamery, Inc.*, 415 Mass. at 15-16, 611 N.E.2d at 243 (JA126). But it is not just who contributes to the Fund that is the gravamen; it is also who takes out of the Fund. Almost all money paid into the Fund comes from out-of-state milk sources, while all the money paid out is given to in-state producers. Moreover, this Court has consistently struck down state laws that have the appearance of being evenhanded, when the purpose or effect of the regulation is discriminatory. See, e.g., *Brown-Forman Distillers Corp.*, 476 U.S. at 573; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 333; *Baldwin*, 294 U.S. at 511. Indeed, this evenhandedness argument was considered and rejected by this Court in *Baldwin*. There, this Court recognized that the New York law was evenhanded because it established the same minimum price for in-state and out-of-state milk. *Baldwin*, 294 U.S. at 521. This Court held, however, that the establishment of a minimum price applicable to out-of-state milk constituted an "unreasonable clog upon the mobility of commerce" because it attempted to protect in-state dairy farmers "from the cut prices and other consequences of competition." *Id.* at 527.

The discriminatory effect of the Pricing Order is even more egregious than in *Baldwin*. In *Baldwin*, the Vermont farmers actually received the difference between the market price and the state minimum price for milk sold in New York. See *id.* at 519. Here, that differential does not go to out-of-state farmers; it is paid over to the Massachusetts farmers instead. That exacerbates the constitutional problem.

The Massachusetts court incorrectly distinguished the effect of the Pricing Order from the statute in *Baldwin* by arriving at the erroneous conclusion that "[t]he Pricing Order does not establish a minimum price milk dealers must pay for milk regardless of origin." *West Lynn Creamery, Inc.*, 415 Mass. at 16, 611 N.E.2d at 243 (JA126). In support of this position, the Massachusetts court stated that "milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs." *Id.*, 611 N.E.2d at 244 (JA127). This conclusion completely ignores the effects of the Pricing Order²¹ and this Court's decision in *Baldwin*. While milk dealers will always have the incentive to purchase milk at a lower price, the Pricing Order eliminates their ability to do so. As in *Baldwin*, the Pricing Order eliminates any incentive that milk dealers may have had to purchase lower priced milk from out-of-state farmers. Such incentives are eliminated because the milk dealers are required to make assessment payments on all milk purchased out-of-state, and thus, any savings otherwise derived from reducing the purchase price are absorbed by the increased assessment.

²¹ If the federal blend price for milk were \$12.00, under the Pricing Order, the assessment payments would be equal to the difference between \$15.00 and \$12.00 divided by three, or \$1.00. (JA35-36). This \$1.00 would be multiplied by the amount of Class I milk the dealer sold in Massachusetts. (JA36). Further assume that a Class I milk dealer purchases 500,000 cwt of milk from out-of-state farmers and 500,000 cwt of milk from Massachusetts farmers, and sells all the milk it purchases as Class I milk in Massachusetts. The milk dealer's assessment payment would be \$1,000,000. (JA35-36). Purchasing more milk from out-of-state farmers, as the Massachusetts court suggests, would not reduce the milk dealer's costs: if the milk dealer were to purchase all of its milk, 1,000,000 cwt, from out-of-state farmers and no milk from Massachusetts farmers, its assessment payable to Massachusetts farmers would still be \$1,000,000. Therefore, buying out-of-state milk simply will not reduce the milk dealer's costs.

D. The Pricing Order is Not a Limited Regulation of Intrastate Commerce.

Relying on *Milk Board v. Eisenberg Co.*, 306 U.S. at 346, Massachusetts has asserted that the Pricing Order is constitutional because it "does not 'attempt to regulate the price to be paid for milk in a sister state. . . .'" (Respondent's Brief in Opposition to Petition for Certiorari at 18-20 citing *Eisenberg*, 306 U.S. at 353). The statute in *Eisenberg*, however, is wholly different from the Pricing Order. In *Eisenberg*, Pennsylvania set a minimum price that milk dealers had to pay for milk produced in Pennsylvania. A local dealer argued that the statute burdened interstate commerce because the dealer intended to ship his milk out-of-state after purchasing it in Pennsylvania. This Court upheld the statute, despite the argument that there was an indirect effect on interstate commerce. *Eisenberg*, 306 U.S. at 353.²²

The Commissioner's reliance on *Eisenberg* is inapposite. The issue in the case before this Court does not involve the Commissioner's authority to fix a minimum price for milk: this minimum price law does not only apply to Massachusetts produced milk. The Pricing Order, like the statute in *Baldwin*, effectively sets a minimum price for *all* milk, by requiring dealers to make assessment payments to Massachusetts dairy farmers through the Fund, based on the total amount of milk sold in Massachusetts, regardless of where the milk was originally purchased. (JA35-36).

The Pricing Order, like the statute in *Baldwin*, regulates the cost of milk produced in other states. The statute in *Eisenberg*, however, operated only intrastate and the milk dealer in *Eisen-*

²² The *Eisenberg* Court concluded that the Pennsylvania statute had only an incidental effect on interstate commerce. This conclusion was based in part on the fact that "only a small fraction of the milk produced . . . in Pennsylvania is shipped out of the Commonwealth." *Id.*

berg, unlike the milk dealer in Massachusetts, could purchase its milk at lower prices from other states. Purchasing milk from out-of-state, of course, would cause economic harm to the local farmers involved in the *Eisenberg* case. The Commerce Clause, however, does not necessarily preclude states from burdening local industry, explaining the result in *Eisenberg*; the Commerce Clause does preclude the states from discriminating against industry in other states, explaining the result in *Baldwin*.²³

E. The Pricing Order is not a Constitutional Use Tax Under *Henneford v. Silas Mason Co.*, 300 U.S. at 577.

This case is distinguishable from the compensatory "use tax" upheld in *Henneford v. Silas Mason Co.*, 300 U.S. at 577. "Equal treatment of interstate commerce . . . has been the common theme in which this Court has sustained 'compensating' state use taxes." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977) quoting *Henneford*, 300 U.S. at 577. In *Henneford*, Washington state imposed a use tax on goods purchased out-of-state by Washington residents who then brought those goods for use into Washington. *Henneford*, 300 U.S. at 579. The use tax was set at the same rate as the Washington state sales tax on goods purchased in Washington, and was paid into the state's general tax fund. *Id.* at 581. The *Henneford* Court acknowledged that the effect of the tax was to help Washington retailers compete "upon terms of equality with retail dealers in other states. . ." *Id.* Therefore, the Court concluded that the use tax did not burden

²³ In the view of one author, *Eisenberg* is explained as follows: "The Pennsylvania regulation did not distribute its burden more heavily on milk distributors and consumers outside the state than on those within. Indeed, Pennsylvania producers exported only about ten percent of the milk subject to the minimum price regulation to other states." Smith, *State Discrimination Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1214 (1986).

interstate commerce because the effect of the tax was nondiscriminatory treatment of in-state and out-of-state purchases. *Id.* at 584.

Unlike the use tax in *Henneford*, the Pricing Order was not promulgated to remove a tax disadvantage, but to give Massachusetts dairy farmers a competitive advantage over out-of-state dairy farmers. (JA10-24). In addition, unlike the use tax in *Henneford*, assessments under the Pricing Order are not paid into the General Fund of the Commonwealth, but are retained in a segregated Fund by the Massachusetts Department of Food and Agriculture. (JA35-38). The monies deposited into this segregated Fund are then distributed to in-state dairy farmers only. (JA36-38). Massachusetts farmers, therefore, receive a direct benefit from the sale of milk produced out-of-state. In *Henneford*, on the other hand, the imposition of the tax did not benefit Washington retailers affirmatively, but rather removed the disadvantage caused by the sales tax. Therefore, unlike the tax in *Henneford*, the payments from milk dealers to the Massachusetts farmers do more than equalize the playing field. Massachusetts farmers receive a higher price for their milk and are protected from suffering a corresponding reduction in sales. See *Farmland Dairies v. McGuire*, 789 F. Supp. at 1252-1253.²⁴

F. The Pricing Order is not a Constitutional Subsidy.

Massachusetts has argued that the Pricing Order does not violate the Commerce Clause because it provides a subsidy to an in-state industry and does not directly burden out-of-state farmers. Massachusetts, relying on *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 278, contends that a state may "sub-

²⁴ See also *Regan*, *supra* note 14, at 1246.

sidize" domestic industry without violating the Commerce Clause.²⁵ (Respondent's Brief in Opposition to Petition for Certiorari at 26). The State's argument, however, is fundamentally flawed: the Pricing Order is not a subsidy — it is a regulatory scheme which increases the minimum price to be paid to local dairy farmers and uses milk sales from out-of-state farmers as a revenue source for paying Massachusetts farmers the difference between the market price and the increased minimum price. This regulatory scheme directly impacts interstate commerce — directly favoring in-state interests at the expense of out-of-state interests. Unlike this regulatory scheme, state subsidy programs distribute state funds from the state's treasury to in-state industries: the monies distributed to the in-state industries are not derived from taxing out-of-state sources. Such subsidy programs are presumed to be valid because the states have the power to "limit benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Reeves v. Stake*, 447 U.S. at 442 (emphasis added); see also, *White v. Massachusetts Council of Construction Employees, Inc.*, 460 U.S. 204, 221 (1983) (Blackmun, J., concurring in part and dissenting in part) (state has the power "to limit to state residents the direct benefits of subsidy programs supported with state funds.") (emphasis added). In other words, a state can "channel state

²⁵ In *Limbach*, this Court did not hold that all state subsidy programs will pass muster under the dormant Commerce Clause. Rather, the Court, in *dicta*, noted that such subsidy programs "might not be characterized as proprietary." *Limbach*, 486 U.S. at 277 citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 n.14 (1980) and *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794 (1976). This Court, however, has upheld state subsidy programs when the state is acting as a "market participant," rather than as a regulator. *Hughes v. Alexander Scrap Corp.*, 426 U.S. at 794. In *Alexander Scrap*, this Court held that when a state acts as "market participant," rather than as a government regulator, it is exempt from Commerce Clause scrutiny. *Id.* at 809-810. Here, Massachusetts has not, and could not, argue that the "market participant" exception applies because Massachusetts' actions in enacting the Pricing Order are, without question, regulatory in nature.

benefits to the residents of the state supplying them." *Reeves, Inc. v. Stake*, 447 U.S. at 443 n.16.²⁶

The Pricing Order clearly may not be classified as a subsidy. In fact, the Pricing Order never uses the word subsidy. Instead, the Pricing Order specifically states that it is a measure designed to regulate the producer price of milk: "This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price." (JA32).

As previously stated, 90% of all Class I milk sold in Massachusetts is imported from out-of-state dairy farmers. (JA66). Therefore, most of the money collected into the Fund is derived from the sale of out-of-state milk. To use out-of-state money to support in-state businesses only further fans the flames of

²⁶See also, Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 541-545 (1981). Professor Varat discusses whether state subsidy programs are valid under the Commerce Clause. Varat stresses that the initial inquiry should be "the nature of the subsidy and its relationship to the comparative tax obligations of resident and nonresident business." *Id.* at 541. In defining the issue, Varat states:

The issue is best framed by asking whether a state is free to grant direct subsidies to in-state business only, assuming the state does not tax the in-state activity or income of either resident or non-resident business. The qualification is necessary, because it is clear that the states are forbidden to tax out-of-state businesses more heavily than in-state businesses, that they may therefore not allow resident businesses tax deductions or exemptions unavailable to nonresident businesses, and that the same impermissible result would be produced if resident and nonresident businesses were equally taxed but only resident businesses received cash subsidy rebates.

Id. at 541-542 (emphasis added). See also, Collins, *supra* note 12, at 98. In discussing the constitutionality of state subsidy schemes, Professor Collins, like Professor Varat, assumes that the subsidy program is "paid from general state tax revenues." *Id.* at 98-99 n.332. Professor Collins notes that "[a]n earmarked tax on locally subsidized goods paid by the industry would presumably be struck down, since the tax and subsidy scheme together would constitute a discriminatory tax." *Id.* (emphasis added).

conflict between the states in this case. Since the Pricing Order is an economic regulation, with a funding source derived from the sale of out-of-state goods, the State's argument that subsidy programs are constitutional is simply inapposite.

In the alternative, the State has argued that the Pricing Order is valid because it has the same "impact on interstate activities" as would a subsidy from general tax revenues. (Respondent's Brief in Opposition to Petition for Certiorari at 29). This Court, however, has held that a state's power to directly subsidize its own residents cannot justify economic regulations which attempt to achieve the same goal through the improper regulation of interstate commerce. *Limbach*, 486 U.S. at 278. In *Limbach*, this Court invalidated an Ohio law which awarded a tax credit against the Ohio motor vehicle fuel sales tax for ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a state granting similar tax advantages to ethanol produced in Ohio. *Id.* at 271. While this Court acknowledged, in *dicta*, that Ohio could have provided a direct subsidy to its own ethanol producers, it could not do so by directly regulating interstate commerce. *Id.* at 278. Accordingly, Massachusetts cannot defend the Pricing Order by asserting that it has the same effect as a subsidy that might not be unconstitutional in another form.

II. The Pricing Order Violates the Commerce Clause Because its Burdens on Interstate Commerce Outweigh any In-state Benefits.

If this Court were to conclude, despite *Baldwin*, that the Pricing Order is not a *per se* violation of the Commerce Clause, then the lesser standard of scrutiny articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. at 142 should be employed. Under *Pike*, a statute will be struck down if the burdens im-

posed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) citing *Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities." *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. at 471.

Concluding that the Pricing Order does not discriminate against interstate commerce on its face, the Massachusetts court instead applied the lesser standard of scrutiny approved in *Pike*. *West Lynn Creamery, Inc.*, 415 Mass. at 19, 611 N.E.2d at 245 (JA129-130). Applying *Pike*, the court concluded that while the Pricing Order burdened interstate commerce, this burden was "incidental given the purpose and design of the program." *Id.* at 17-18, 611 N.E.2d at 244 (JA128).

Pike, however, requires an inquiry into whether the Pricing Order could be achieved with a lesser impact on interstate commerce. *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. at 471 quoting *Pike*, 397 U.S. at 142. The Massachusetts court, however, disregarded this aspect of the *Pike* analysis, despite the fact that there are many ways the state could subsidize its in-state dairy producers without violating the Commerce Clause.²⁷ For example, the state could provide dairy farmers with tax subsidies from the Commonwealth's general tax fund or tax relief in the form of reduced property tax or income tax payments. The State could also provide less direct relief by increasing state aid to finance research into more efficient means of dairy production. In addition, as the Peti-

²⁷ As previously discussed, such subsidy programs are presumed to be valid because Massachusetts would be using Massachusetts funds derived from Massachusetts residents to serve citizens of the state. See *supra* notes 25-26 and accompanying text. In addition, such a subsidy scheme, unlike the Pricing Order, would afford Massachusetts legislators and voters a direct say in whether to support a particular state industry with state tax dollars.

tioners argued below, the Commissioner could have simply raised the price that dealers pay for Class I milk to in-state farmers. *Baldwin* does not prohibit any of these activities.

Neither the Commissioner nor the Massachusetts court, however, considered the availability of any less restrictive alternatives to the Pricing Order. Massachusetts simply cannot require out-of-state dairy farmers, and the milk dealers who purchase milk from them, to provide economic assistance to Massachusetts dairy farmers when perfectly legitimate constitutional alternatives, that do not burden out-of-state producers or interstate commerce, exist.

CONCLUSION

For the aforementioned reasons, the decision of the Massachusetts Supreme Judicial Court should be reversed.

Respectfully submitted,

MICHAEL L. ALTMAN

Counsel of Record

MARGARET A. ROBBINS

RUBIN AND RUDMAN

50 Rowes Wharf

Boston, Massachusetts 02110

(617) 330-7000

Counsel for Petitioners

DATED: November 15, 1993

13

Supreme Court, U.S.
FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-141

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993.

CORRECTED COPY

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
Petitioners,
v.

JONATHAN HEALY, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF ON THE MERITS

SCOTT HARSHBARGER
*Attorney General
of Massachusetts*

DOUGLAS H. WILKINS
ERIC A. SMITH*

Assistant Attorneys General
One Ashburton Place, Room 2019
Boston, MA 02108
(617) 727-2200

**Counsel of Record*

BEST AVAILABLE COPY

54 pp

Question Presented.

Does a Massachusetts order requiring milk dealers to make payments to a state trust fund based upon the amount of fluid milk they sell for consumption in Massachusetts and providing for a subsidy to Massachusetts dairy farmers violate the interstate Commerce Clause?

Table of Contents.

Question Presented.	1
Relevant Constitutional, Statutory and Administrative Provisions.	2
Statement.	3
A. <i>The Massachusetts Milk Order.</i>	3
1. Findings and Adoption of the Order	3
2. Operation of the Milk Order	5
B. <i>The License Revocation Proceedings.</i>	7
C. <i>The Commissioner's Revocation Deci- sions.</i>	8
D. <i>The Opinion of the Supreme Judicial Court of Massachusetts.</i>	10
Summary of Argument.	12
Argument.	15
I. THE ORDER SERVES LAWFUL PURPOSES WITH- OUT UNLAWFUL DISCRIMINATION.	16
A. <i>The Purpose of the Order, To Save an Industry From Collapse, Is Not "Protec- tionist."</i>	16
B. <i>The Milk Order Achieves Its Goals Through Lawful Means.</i>	20
1. The Subsidy To Massachusetts Farm- ers Does Not Violate The Commerce Clause	21

2. The Assessment Upon All Milk Consumed In Massachusetts Is Evenhanded and Lawful	25
3. The Linkage Of The Milk Assessment And The Milk Subsidy Does Not Invalidate The Milk Order Under The Commerce Clause	30
a. Use of a special state fund to collect the assessment and pay the subsidy raises no Commerce Clause issue.	30
b. Linkage of the assessment and the subsidy does not constitute extra-territorial price regulation.	35
II. THE BENEFITS OF THE MILK ORDER OUTWEIGH ANY BURDEN UPON INTERSTATECOMMERCE.	40
Conclusion.	42

Table of Authorities.

Cases.

<i>Alaska v. Arctic Maid</i> , 366 U.S. 199 (1961)	29
<i>American Trucking Ass'ns, Inc. v. Scheiner</i> , 483 U.S. 266 (1987)	25
<i>Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n</i> , 461 U.S. 375 (1983)	27
<i>Armco Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	29
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	16, 28
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	14, 35-38
<i>Boston Stock Exchange v. State Tax Comm'n</i> , 429 U.S. 318 (1977)	26, 32
<i>Brown-Forman Distillers v. New York Liquor Authority</i> , 476 U.S. 573 (1986)	27, 38
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	28
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	27, 40
<i>Crane v. Commissioner of Dep't of Agriculture, Food & Rural Resources</i> , 602 F. Supp. 280 (D. Me. 1985)	38

<i>CTS Corp. v. Dynamics Corp. of America</i> , 481 U.S. 69 (1987)	15, 24
<i>Cumberland Farms, Inc. v. Lafaver</i> , D. Me. No. 92-70-P-H (August 3, 1993), appeal docketed, No. 93-2066 (1st Cir.)	20, 34
<i>Department of Revenue of Washington v.</i> <i>Association of Washington Stevedoring Cos.</i> , 435 U.S. 734 (1978)	40
<i>Farmland Dairies v. McGuire</i> , 789 F. Supp. 1243 (S.D.N.Y. 1992)	34
<i>Goldberg v. Sweet</i> , 488 U.S. 252 (1989)	18, 27, 31, 33
<i>H.P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	32
<i>Halliburton Oil Well Co. v. Reily</i> , 373 U.S. 64 (1963)	28
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	14, 25-27, 34, 36, 38, 39
<i>Highland Farms Dairy, Inc. v. Agnew</i> , 300 U.S. 608 (1937)	39
<i>Howes Brothers Co. v. Unemployment</i> <i>Compensation Comm'n</i> , 296 Mass. 275, 5 N.E.2d 720 (1936), cert. denied, 300 U.S. 657 (1937)	27
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	22-24, 37, 40

<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	15
<i>International Harvester Co. v. Dep't of</i> <i>Treasury</i> , 322 U.S. 340 (1944)	26, 28
<i>Kassel v. Consolidated Freightways Corp.</i> <i>of Delaware</i> , 450 U.S. 662 (1981)	18, 33
<i>Lewis v. BT Investment Managers, Inc.</i> , 447 U.S. 27 (1980)	17
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	15, 41
<i>Marigold Foods, Inc. v. Redalen</i> , 809 F. Supp. 714 (D. Minn. 1992)	34
<i>McGoldrick v. Berwind-White Coal</i> <i>Mining Co.</i> , 309 U.S. 33 (1940)	27, 28, 33
<i>Metropolitan Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985)	17
<i>Milk Control Bd. v. Eisenberg Farm</i> <i>Products</i> , 306 U.S. 346 (1939)	17, 39, 40
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	18, 33, 41, 42
<i>New Energy Co. of Indiana v. Limbach</i> , 486 U.S. 269 (1988)	16, 21, 36
<i>New York v. United States</i> , 112 S. Ct. 2408 (1992)	32

<i>Opinion of the Justices</i> , 601 A.2d 610 (Me. 1991)	34
<i>Parker v. Brown</i> , 317 U.S. 341 (1943)	17, 29
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	14, 15, 40, 41
<i>Raymond Motor Transportation, Inc. v. Rice</i> , 434 U.S. 429 (1978)	27, 41
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	17, 34
<i>Schwegman Bros. Giant Super Markets v. Louisiana Milk Comm'n</i> , 365 F. Supp. 1144 (M.D. La. 1973), <i>aff'd</i> , 416 U.S. 922 (1974)	39
<i>South-Central Timber Development, Inc. v. Wunnicke</i> , 467 U.S. 82 (1984)	22
<i>Stark v. Wickard</i> , 321 U.S. 288 (1944)	38
<i>Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue</i> , 483 U.S. 232 (1987)	28
<i>United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n of Pennsylvania</i> , 335 F. Supp. 1008 (M.D. Pa.), <i>aff'd</i> , 404 U.S. 930 (1971)	38, 39
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	27
<i>Westinghouse Electric Corp. v. Tully</i> , 466 U.S. 388 (1984)	32

<i>Wisconsin Dep't Of Indus. Labor & Human Relations v. Gould, Inc.</i> , 475 U.S. 282 (1986)	32
<i>Woodruff v. Parham</i> , 75 U.S. (8 Wall.) 123 (1868)	28
<i>Wyoming v. Oklahoma</i> , 112 S. Ct. 789 (1992)	16, 20, 28
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	22

United States Constitution.

U.S. Const. Art. I, § 8, cl. 3	<u>passim</u>
U.S. Const. Art. IV, § 4	34

Federal Statutes and Regulations.

7 U.S.C. § 608c(5)(B)(ii)	6
42 U.S.C. § 1983	10, 15
Agricultural Marketing Agreement Act of 1937	38
7 C.F.R. 1001.62	6
7 C.F.R. § 1001.51	38

Massachusetts Statutes and Regulations.

Mass. G.L. c. 29, § 2V	2, 7, 13, 21, 30, 35
Mass. G.L. c. 94A, § 6	7
Mass. Gen. Laws c. 94A, § 10	37
Mass. Gen. Laws c. 94A, § 11	37
Mass. St. 1992, c. 23, § 7	7
Mass. R. Civ. P. 64	10

Other State Statutes and Regulations

Cal. Food & Agric. Code, Div. 22, c. 1, § 64181 (West 1993)	22
Me. Rev. Stat. Ann. tit. 36, § 4541 (West 1992), enacted by 1991 Me. Laws ch. 526, amended and extended by 1993 Me. Laws ch. 104, § 2, and 1993 Me. Laws ch. 274, §§ 3-5	20
Minn. Stat. Ann. § 32A.071 (West Supp. 1993), enacted by 1992 Minn. Laws ch. 602, superseded by Minn. Stat. Ann. § 32.73, enacted by 1993 Minn. Laws ch. 65	20
N.Y. Agric. & Mkts. Law, § 258-m (Consol. Laws Supp. 1993), as amended by 1991 N.Y. Laws ch. 84	20
N.Y. Agric. and Mkts Law, Art. 21-AA, § 258-aa (Consol. Laws Supp. 1993)	22

N.Y. Comp. Codes R. & Regs. tit. 1, pt. 22 (1991)	20
Vt. Stat. Ann. tit. 6, § 2951 (West Supp. 1993)	22
Vt. Stat. Ann. tit. 6, § 2991 (West 1988) (effective May 19, 1988 through April 30, 1989), repealed by 1991 Vt. Laws 79, § 7	22
Vt. Stat. Ann. tit. 6, § 2924(e) (West Supp. 1993), enacted by 1991 Vt. Laws No. 232 (Adj. Sess.), § 9	20
Vt. Stat. Ann., tit. 6, § 2964 (West Supp. 1993)	22
Code Vt. Rules 20011004 (Weil 1993)	22

Miscellaneous.

1991 Mass. House Doc. No. 4390, § 3	32
Coenen, <i>Untangling the Market-Participant Exemption to the Dormant Commerce Clause</i> , 88 Mich. L. Rev. 395 (1989)	22, 23
Dowling, <i>Interstate Commerce and State Power</i> , 27 Va. L. Rev. 1 (1940)	41
Gergen, <i>The Selfish State and the Market</i> , 66 Tex. L. Rev. 1097 (1988)	23

Hellerstein, <i>Some Reflections on the State Taxation of a Nonresident's Personal Income</i> , 72 Mich. L. Rev. 1309 (1974)	30
Note, <i>State Taxing Schemes Discriminating in Violation of the Foreign Commerce Clause: Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance</i> , 46 Tax Lawyer 555 (1993)	42
Regan, <i>The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause</i> , 84 Mich. L. Rev. 1091 (1986)	22-25, 27, 29
Smith, <i>State Discriminations Against Interstate Commerce</i> , 74 Cal. L. Rev. 1203 (1986)	29
Tribe, <i>American Constitutional Law</i> , (2d ed. 1988)	40
Varat, <i>State "Citizenship" and Interstate Equality</i> , 48 U. Chi. L. Rev. 487 (1981)	29, 37

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1993.

WEST LYNN CREAMERY, INC., and
 LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF THE
 MASSACHUSETTS DEPARTMENT OF
 FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
 SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF ON THE MERITS

Massachusetts, like several other States, has adopted laws to avert the crisis affecting dairy farming within its borders, which threatens to diminish or destroy the economic, social, environmental and educational benefits of dairy farms. The petitioners' contention that these laws violate the dormant Commerce Clause, if successful, would impair the State's ability to serve its citizens by preserving these benefits.

**Relevant Constitutional, Statutory
and Administrative Provisions.**

The Constitution of the United States, Art. 1, § 8, cl. 3, provides in relevant part:

The Congress shall have the Power . . . To Regulate Commerce . . . among the several States

Massachusetts General Laws, chapter 29, § 2V (1992), provides:

There shall be established and set up on the books of the commonwealth a separate fund to be known as the Dairy Equalization Fund. There shall be credited to such fund all monies payable pursuant to sections ten, eleven and twelve of chapter ninety-four A and any interest earned on monies within the fund. Amounts credited to said fund shall be made available by the state treasurer, without further appropriation, exclusively for the purposes of said chapter ninety-four A, only after receipt of notice certified by the commissioner of the department of food and agriculture that amounts are due pursuant to said chapter ninety-four A. Said commissioner shall file quarterly reports with the house and senate clerk and the house and senate committees on ways and means regarding the distribution of monies from the fund.

The amended pricing order (the "Milk Order") issued by the Massachusetts Commissioner of the Department of Food and Agriculture ("Commissioner") on February 26, 1992, is reproduced in the Joint Appendix ("J.A.") at 32-40, except that the

date of the original order of February 18, 1992, is incorrectly reproduced as February 18, 1991, on page J.A. 40.¹

Statement.

A. The Massachusetts Milk Order.

1. Findings and Adoption of the Order.

On January 28, 1992, after extensive hearings, the Commissioner declared a state of emergency in the Massachusetts dairy industry (J.A. 26, 30-31). He determined that a price stabilization program was necessary because rising production costs and flat (and recently declining) dairy prices were devastating the industry (J.A. 28; see also J.A. 13, 16, 20-21).² As the report of the Governor's Special Commission noted, 434 Massachusetts dairy farms—or roughly half of the dairy farms in the Commonwealth—went out of business between 1980 and 1991 (J.A. 13).³ An analysis presented at the Commissioner's hearings predicted that:

[W]ithout immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the

¹ Compare the photocopy of the Order in the Joint Appendix filed with the Supreme Judicial Court of Massachusetts ("SJC A.") at page 535.

² For example, while the average blend price per hundredweight ("cwt") of milk paid Massachusetts dairy farmers in 1991 was \$12.64, the farmers' average production cost was over \$15.00/cwt, resulting in an average loss of over \$2.00 per cwt (J.A. 27).

³ The Commissioner expressly incorporated the Special Commission's report to the Massachusetts Legislature in his report (J.A. 27).

report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

(J.A. 28). The Commissioner determined that this "crisis threatens a cornerstone of our state's agricultural industry" (J.A. 30). He concluded that:

[W]e must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

(J.A. 31).

The citizens of the Commonwealth derive numerous benefits from the continued existence of Massachusetts dairy farms. The dairy farms encompass nearly 300,000 acres of well maintained open land in Massachusetts (J.A. 18). That land provides wildlife habitat that is protected from development and often available for recreation such as horseback riding, snowmobiling, skiing, hunting and fishing (J.A. 18). Without the dairy farms, Massachusetts will lose "the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism and education" (J.A. 13). Moreover, loss of the dairy farms would threaten the infrastructure of related agricultural businesses, including farm equipment sales, feed stores, artificial insemination services and farm credit institutions (J.A. 19-20).

The Commissioner issued the initial Milk Order on February 18, 1992 (see above, p. 3), and amended it on February 26, 1992 (J.A. 40). The Order is to "provide an immediate interim solution

to the state of emergency facing the Massachusetts dairy industry" (J.A. 32).⁴

2. Operation of the Milk Order.

The Order applies to all milk dealers engaged in the handling of milk within the Commonwealth (J.A. 32, Part II.A).⁵ It contains three essential features, to which this brief refers as the Milk Assessment, the Milk Subsidy and the Dairy Equalization Fund.

The Order requires all milk dealers, wherever located, to make monthly payments into the Fund with respect to their sales of Class I (*i.e.*, fluid) milk in the Commonwealth (the "Milk Assessment"). "Every dealer . . . is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts" (J.A. 35, Part V.A).⁶

⁴ The Order continues in effect, although the petitioners have recently argued (incorrectly) that the Order expired as a matter of law on February 17, 1993. See Plaintiffs' Motions for Summary Judgment at 1 (September 23, 1993) served in *West Lynn Creamery, Inc. v. Healy, Commissioner*, No. 93-3914-B (Suffolk Superior Court) (judicial review of Commissioner's decision dated June 11, 1993); *LeComte's Dairy, Inc. v. Healy, Commissioner*, No. 93-3923-B (Suffolk Superior Court) (same).

⁵ The Order defines "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer" (J.A. 32-33, Part II.A).

⁶ To ensure that only one payment is made with respect to any particular milk, the Order excludes "sales to another Massachusetts licensed dealer" from the amount to be reported (J.A. 34, Part IV.B(1); see also J.A. 35, Part V.A).

The Assessment does not depend upon the price actually paid for the milk. Rather, it is one-third of the difference between \$15 and the applicable federal blend price per hundredweight (J.A. 35, Part V.B(1)).⁷ The dealers' payments are determined by multiplying this "order premium" by the amount sold for Class I utilization in the month (J.A. 36, Part V.B(2)). The payments are due with the monthly reports on the 25th of each month (J.A. 34, Part IV.A).

The Order then provides for subsidies to Massachusetts dairy farmers (the "Milk Subsidy"). The Commissioner "shall direct that monthly distributions from the Fund are made by the fifth (5th) day of each month" to "every Massachusetts producer based upon their proportion of milk produced in Massachusetts . . ." (J.A. 36, Part VI.A).⁸ The farmer may receive a monthly subsidy only for up to 200,000 pounds of production (J.A. 36, 37, Parts VI.A(1),(3)).

If the total of all Milk Assessments in a given month exceeds the total Milk Subsidy, the Order requires that rebates of all excess assessments "be distributed directly to the licensed

⁷ The Federal blend price is determined by the Secretary of Agriculture and represents the weighted average of the Federal minimum prices for the various classes of milk based on sales for the month (with certain adjustments). See 7 U.S.C. § 608c(5)(B)(ii). *E.g.*, 7 C.F.R. 1001.62. The Order bases the premium on the Federal blend price in Zone 21 of Federal Milk Marketing Order No.1 for the second preceding month, (J.A. 35, Part V.B(1)), because that is typically the most recent information available.

⁸ The Order defines "producer" as "any person producing milk from dairy cattle" (J.A. 33, Part II). The amount "produced" is actually the amount of milk produced and sold by Massachusetts dairy farmers in any given month (J.A. 34-35, Parts IV.B(2), IV.C).

dealers, based upon each dealer's proportionate contribution to the total fund . . ." (J.A. 37, Part VI.C, see J.A. 58).⁹

Allaying milk dealers' "concerns over the funds being deposited into a state account for redistribution and not paid directly to the farmers" (J.A. 22), the Order also established the Massachusetts Dairy Equalization Fund ("Fund") (J.A. 35, Part V.A). In April 1992, the Massachusetts Legislature enacted, and the Governor approved, legislation establishing the Fund on the books of the Commonwealth. See Mass. St. 1992, c. 23, § 7, adding Mass. Gen. Laws c. 29, § 2V. Under the statute, amounts credited to the Fund are made available by the State Treasurer, without further appropriation, after receipt of notice certified by the Commissioner. *Id.*

The Order finally provides for enforcement by administrative proceedings. In the event that a dealer "fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted" (J.A. 38, Part VII.A).

B. *The License Revocation Proceedings.*

The petitioners are both located and incorporated in Massachusetts (J.A. 45, 98, 103). At administrative license revocation hearings on September 14, 1993, they conceded that they had failed to make payments under the Milk Order (J.A. 57, 64).

They also presented the testimony of the state senator and state representative from the electoral districts that include Lynn,

⁹ No part of the Fund is used for purposes other than distributions to farmers or rebates to dealers. (J.A. 37, Part VI.B).

Massachusetts, the town where West Lynn has its principal place of business (see J.A. 56; SJC A. 386-404). West Lynn's president, Arthur J. Papathanasi also provided testimony and an affidavit (J.A. 56, 65). Finally, West Lynn presented an affidavit by an expert, Dr. Ronald D. Knutson (J.A. 57, 68).

Papathanasi testified that West Lynn "absorbed roughly 50 percent of the tax that is being assessed" (J.A. 58). While it had tried to "pass on" the premiums imposed by the Order to its customers, West Lynn was able to pass on only 50 percent (J.A. 58). Papathanasi provided no information concerning any changes in West Lynn's prices or sales; he noted only that its margins were "eroding" (J.A. 58, 67).

In the Knutson affidavit, which West Lynn offered without supporting testimony, the affiant theorized that the assessments placed on milk dealers and the subsidies to Massachusetts farmers under the Milk Order had several effects on interstate commerce. These contentions were rejected by the Commissioner, as discussed below pp. 9-10.

C. The Commissioner's Revocation Decisions.

After finding that the milk dealers had violated the Milk Order by failing to make required payments, the Commissioner rejected their Commerce Clause defense (J.A. 87-89, 94-96). He concluded, first, that:

[t]he Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states.

(J.A. 88, 94-95). Turning to the dealers' allegation of discrimination between in-state and out-of-state farmers, the Commissioner noted that the Order "does not limit the amount of Class I milk imported into Massachusetts" (J.A. 88, 95). He found that the Order "does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers" (J.A. 88, 95).

The Commissioner considered and rejected the milk dealers' claim that the Order may affect the price received by out-of-state farmers beyond the federal minimum price (J.A. 88, 95). He noted that the dealers' argument assumed that Massachusetts farmers will increase their production and found that the assumption was "not supported by the record" (J.A. 88, 95). While the Knutson affidavit asserted that the Order would cause an increase in production by Massachusetts farmers, (J.A. 71), the evidence in the record showed that Massachusetts production had actually declined since implementation of the Order in April, 1992 (J.A. 82). The Commissioner concluded that the contention was:

speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers.

(J.A. 89, 95).¹⁰ The Commissioner likewise rejected, as not supported by the record, the dealers' claim that any increase in Massachusetts milk production would cause a decline in payments to out-of-state farmers (J.A. 89, 95).

¹⁰ The Special Commission found that Massachusetts producers already had increased their production significantly by 1991, *before* the Milk Order was adopted, in some cases by 20 percent or more (J.A. 21).

The Commissioner found that the record did not support the dealers' claim that they would be harmed by a reduction in the demand for milk due to a rise in retail prices (J.A. 89, 96). The dealers did not offer any evidence of an increase in the retail price. The only evidence concerning actual retail prices was Knutson's assertion that "[p]rior to the imposition of the tax," the retail price of milk in Massachusetts "generally ranged from about \$1.99 per gallon to \$2.49 per gallon" (J.A. 71). Given such a large variation in the retail price per gallon before the Order, consumers might not notice a small increase from the assessment (see J.A. 18). Moreover, West Lynn, at least, absorbed about one-half of the cost of the assessment (J.A. 58) so any increase in the retail price would be greatly reduced.¹¹

Based upon his findings, the Commissioner conditionally revoked the petitioners' milk dealers licenses (J.A. 89, 86).

D. *The Opinion of the Supreme Judicial Court of Massachusetts.*

The petitioners each filed an action in the Massachusetts Superior Court challenging the Commissioner's license revocation decisions (J.A. 98-107). These actions were reserved and reported to the Massachusetts Appeals Court pursuant to Mass. R. Civ. P. 64 (J.A. 6, 7). The Appeals Court consolidated these actions with the petitioners' appeal from the denial of preliminary relief in their separate action, brought under 42 U.S.C. § 1983 (J.A. 6-8, 44-54). The consolidated appeal was transferred, *sua sponte*, to the Massachusetts Supreme Judicial Court (J.A. 8).

¹¹ Knutson's calculation of reduced demand due to a "tax" of \$0.07 per gallon is not explained and is based on the assumption that the entire assessment is passed on to consumers (J.A. 80).

The Supreme Judicial Court held that the Milk Order "does not discriminate on its face, is evenhanded in its application and only incidentally burdens interstate commerce" (J.A. 126). After examining the method of determining the premium payments under the Order, the court concluded that the Order does not establish a minimum price that milk dealers must pay for milk regardless of point of origin because the dealers' premium is *independent* of both the price the dealer pays and the source of the milk. The assessment is "fixed only by the Massachusetts target price, the federal minimum price and the amount of milk the dealer sells in Massachusetts" (J.A. 127). Accordingly, the Order did not manifest any preference for in-state milk over out-of-state milk (*id.*). "[M]ilk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs" (J.A. 127). The Court concluded—as had the Commissioner (J.A. 88)—that the Order did not provide milk dealers an incentive to purchase milk from in-state farmers rather than from out-of-state farmers (J.A. 127).¹²

The Court rejected the dealers' argument that the limitation of Fund distributions to Massachusetts farmers burdened interstate commerce because it would cause Massachusetts production to increase (J.A. 127). Expressly relying on the Commissioner's findings at the initial public hearings and citing to the Commissioner's findings in the administrative proceedings, the Court rejected the dealers' assumption that the distributions would be sufficient to "expand and develop" the Massachusetts dairy industry (J.A. 128 & n.13). It held that the distributions to

¹² The Court noted in closing that the assessments might have detrimental financial impacts on milk dealers, but that those impacts do not "run afoul" of the Commerce Clause. Rather, they are "one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay" (J.A. 130).

Massachusetts farmers under the Order represented only an "infusion of capital designed solely to save an industry from collapse" (J.A. 128). The Court concluded that the limitation of distributions to Massachusetts dairy farmers was only an incidental burden on interstate commerce outweighed by the local benefits (J.A. 128). It remanded the cases to the Superior Court "for action not inconsistent with [its] opinion" (J.A. 130).

Summary of Argument.

1. The Milk Order furthers the legitimate state purposes of saving the Massachusetts dairy farming industry from collapse and preserving the economic, environmental, social, educational, and other benefits of dairy farming. These are legitimate state purposes and are not protectionist. Several other factors disprove protectionist intent. First, the burden of the Milk Order falls extensively upon Massachusetts consumers and businesses. Second, the Milk Assessment does not depend upon the origin of milk or upon the residence of the milk dealer who pays. Third, it resembles legislation in other states that are net exporters of milk.

2. The Milk Order achieves its lawful goals by lawful means. It has three essential elements.

First, the Milk Order supports dairy farming directly by subsidizing Massachusetts farmers. States may grant monetary subsidies to businesses even if, in doing so, they add to the market forces that drive decisions of private businesses. The absence of a subsidy for out-of-state farmers is entirely consistent with decisions of this Court upholding similar subsidies. Compared to most subsidies, the Milk Subsidy has less potential for adverse effect upon interstate commerce, because farmers desperately need funds to pay off farm debt and to increase investment. Price reduction by farmers due to the subsidy,

though lawful, is therefore unlikely. The Constitution does not compel official indifference to the loss of local dairy farming that would result from the petitioners' *laissez-faire* theories.

Second, the Milk Assessment collects funds to pay the subsidy through an evenhanded charge that applies to all milk sold for consumption in Massachusetts. In adopting funding measures, the States are not limited to levies upon goods produced in-state—which would place in-state goods at a disadvantage solely because of the state assessment. Rather, States may adopt laws like the Milk Assessment that assess in-state and out-of-state goods equally. It is no objection that the costs of both in-state and interstate business are increased by such a measure. Nor is the Milk Assessment unlawful because of the Milk Subsidy. Subsidies go toward milk production, not to the processing operations of milk dealers who pay the assessments. The production and the processing segments of the milk industry are not in competition with each other in any relevant respect. In the absence of unequal treatment of dealers who are liable for the assessment, the Milk Assessment is not discriminatory.

Third, the Commonwealth has created a Fund within its Treasury (Mass. Gen. Laws c. 29, § 2V) for the purpose of receiving assessments and paying subsidies pursuant to the Milk Order. Petitioners concede that subsidies from the State's general fund would be lawful, but challenge the use of the special Fund. The Fund serves important governmental purposes by allaying fears expressed by milk dealers during the legislative process "that the money [from the Milk Assessment] will be deposited into the general fund and appropriated for other uses" (J.A. 22-23). Use of such a fund does not implicate the goals of the Commerce Clause to create a federal free trade zone but is an important legislative option. Examination of particular accounting mechanisms used to raise and spend money would expand

Commerce Clause jurisprudence into entirely new areas and would impair the States' ability to fashion effective programs.

The Milk Order does not constitute extraterritorial price regulation proscribed by *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Under the Order, out-of-state farmers are free to ship milk in such amounts and at such prices as they please, subject to federal price *minima*. If consumed in Massachusetts, in-state and out-of-state milk share an equal burden under the Milk Assessment, which does not depend upon the price actually paid by dealers to farmers. Far from an extraterritorial price, this arrangement is lawful under *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937). The petitioners' real complaint is not that out-of-state prices are regulated, but that their own costs are (quite lawfully) increased.

3. Subsidies and evenhanded assessments are not subject to balancing under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Nevertheless, the Commonwealth's interests in preserving its dairy farms outweighs any incidental effects of the Milk Order. Petitioners failed to prove adverse effects on commerce below, and, in any event, such effects would not exceed the usual effects of a lawful in-state subsidy and a non-discriminatory levy. No equally effective alternative with lesser impact on commerce exists. Massachusetts' efforts to preserve its dairy farms therefore comport with the Commerce Clause.

Argument.

Petitioners seek to invalidate Massachusetts law (and to recover under 42 U.S.C. § 1983), based upon negative implications drawn from the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. "The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). If a state law discriminates against interstate commerce on its face or in practical effect, then the State must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). In addition, under the usual dormant Commerce Clause doctrine—which may not even apply to the Order (see below, p. 40)—a non-discriminatory state law is valid under the Commerce Clause unless it imposes burdens upon interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Milk Order is lawful under these tests. Designed to prevent the loss of dairy farming in Massachusetts, the Milk Order has the same purpose as numerous state laws that this Court has upheld under the Commerce Clause. The means chosen are likewise lawful, consisting of a subsidy, an evenhanded assessment and a dedicated revenue fund in the state treasury.

I. THE ORDER SERVES LAWFUL PURPOSES WITHOUT UNLAWFUL DISCRIMINATION.

The Commissioner found that the Milk Order "is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts," "does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states," is "based solely on the amount of Class I milk the dealer sells in Massachusetts" and "does not limit the amount of Class I milk imported into Massachusetts" (J.A. 88, ¶¶ 21, 22; J.A. 94-95, ¶¶ 20, 21). Notwithstanding these findings, relied upon by the Massachusetts Supreme Judicial Court, 415 Mass. at 17 & n.13, 611 N.E. 2d at 244 & n.13 (J.A. 128 & n.13), the petitioners claim that the Milk Order has protectionist purposes and effects. The record amply refutes that claim.

A. *The Purpose of the Order, To Save an Industry From Collapse, Is Not "Protectionist."*

The Supreme Judicial Court found that the "infusion of capital" into dairy farming pursuant to the Milk Order was "designed solely to save an industry from collapse." 415 Mass. at 17, 611 N.E.2d at 244 (J.A. 128). The petitioners attempt to characterize this intent as "protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)) (quoted in Petitioners' Brief on the Merits ("Pet. Br.") at 14). Their argument is wrong for several reasons.

In the first place, one of the very cases cited by the petitioners on this point recognizes that States may enact laws "that have the purpose and effect of encouraging domestic industry." *Bacchus*

Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984). See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-77 n.6 (1985); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Parker v. Brown*, 317 U.S. 341, 367 (1943). See also subsidy cases cited below, pp. 21-22. The Milk Order addresses the undisputed "crisis" in dairy farming which "threatens a cornerstone of our state's agricultural industry" (J.A. 27, 30). See above pp. 3-5. Not only do local dairy farmers produce fresh milk, but they preserve hundreds of thousands of acres of open lands "that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education" (J.A. 13). The benefits of agriculture to the general public have become all the more apparent as farms are lost in an increasingly urban and suburban state like Massachusetts. The Milk Subsidy is thus designed "to reach a domestic situation in the interest of the welfare of the producers and consumers of milk" in Massachusetts. See *Milk Control Bd. v. Eisenberg Farm Products*, 306 U.S. 346, 352 (1939). "[T]he label 'protectionism' [is] of little help" as applied to "the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980).

Second, the operation of the Order disproves any claim of protectionism. The impact of the Milk Assessment falls extensively upon Massachusetts interests. The Assessment affects only milk consumed in Massachusetts, so that *only* in-state consumers feel the effect of any retail price increase that dealers and retailers may pass through to the consumer. The dealers themselves, who absorb some of the costs of the assessment (see J.A. 58-59, 67), have a substantial in-state presence. Though not thoroughly explored in the record, that presence is exemplified by the petitioners, both of which are Massachusetts corporations with principal places of business in Massachusetts (J.A. 85, 92, 98, 103). West Lynn portrayed itself as a major Massachusetts

employer (J.A. 66, 101). The petitioners' attempt to describe the Assessment as falling on "out-of-state milk" (Pet. Br. at 16, 24) ignores the obvious fact that, while milk may originate in other states or in Massachusetts, the Assessment is paid by Massachusetts interests.

As Massachusetts companies, the petitioners must look to the political process for protection from any adverse effects on their business. Commerce Clause scrutiny is at its weakest when powerful in-state interests are affected by the challenged state regulation. See *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 675 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981). In this case, the political power of West Lynn, at least, is far from hypothetical: the state senator and state representative from West Lynn's district both spoke at length in West Lynn's favor during the hearing before the Commissioner on license revocation (SJC A. 386-404).

Third, the petitioners' claim of harm to out-of-state interests is contrary to fact. Their brief has abandoned their economic arguments, which were rejected by the Commissioner (see above pp. 9-10) and by the Supreme Judicial Court. 415 Mass. at 17, 611 N.E.2d at 244 (J.A. 127-28). Instead, they rely upon an erroneous characterization of the Order in an attempt to show harm to out-of-state interests (Pet. Br. at 25 & n.21). Their argument shows only that a dealer's purchase of out-of-state milk neither reduces nor increases the amount of the dealer's assessment. *Id.* at 25 n.21. Any local pricing advantage of out-of-state farmers is unaffected by the Order. For instance, if an out-of-state farmer has a price advantage and is willing to receive the federal minimum price while a Massachusetts farmer seeks to negotiate a price of \$1 above the federal minimum, the Milk Order preserves this \$1 price differential and the resulting incentive for milk dealers "to seek out the lowest unit price for milk."

415 Mass. at 16, 611 N.E.2d at 244 (J.A. 127).¹³ It is true that the dealer must pay an assessment, equal in amount regardless of the milk's origin, if the milk is to be consumed in Massachusetts. This in no way diminishes the out-of-state farmer's \$1 per hundredweight price advantage.¹⁴

Fourth, the petitioners asserted below that the Milk Order will cause some milk consumers to purchase more milk from out-of-state sources (J.A. 74). The Supreme Judicial Court noted that, by raising the costs of doing business in Massachusetts, the Order "may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts," but that such impacts "do not . . . run afoul of the commerce clause." 415 Mass. at 19, 611 N.E.2d at 245 (J.A. 130). This impact rebuts any claim that Massachusetts is discriminating against interstate commerce, for it tends to show that, if the Order has any uneven aspect to it at all, it creates a greater incentive for consumers to purchase milk *outside* Massachusetts than within the Commonwealth.

Finally, evidence of lack of protectionist purpose lies in the diversity of interests in states that—without being large net importers of milk—adopted similar laws prior to the 1992

¹³ Two principles relating to this example are discussed below. First, the crisis in the Massachusetts dairy industry makes it unlikely that farmers would use the Milk Subsidy to reduce prices, rather than to invest and pay off debt (see below, p. 24). Second, even if some price reduction were subsidized (with potential benefits for consumers), that possibility inheres in concededly lawful subsidy programs and is not "protectionist" (see below, p. 24, n.20).

¹⁴ Petitioners' restatement of the Milk Order (Pet. Br. at 25) seems to imply that there is an increased assessment when lower-priced milk is purchased. That is not true, since the assessment is not based upon the purchase price of the milk, but upon the federal blend price. See above, p. 6.

Massachusetts Order.¹⁵ Massachusetts, Minnesota and New York (and Vermont, at least as to its legislature), with their differing positions in the milk production and consumption markets, enacted similar laws with a similar, constitutionally valid purpose.

For all these reasons, the general purpose of the Milk Order is not protectionist. See generally *Clover Leaf Creamery*, 449 U.S. at 471-72.

B. The Milk Order Achieves Its Goals Through Lawful Means.

The lawfulness of the Milk Order's purpose having been established, the next question is whether the Order achieves the Commonwealth's legitimate purposes through lawful means. See *Wyoming*, 112 S. Ct. at 801. The means at issue here are the Milk Subsidy, the Milk Assessment and the Dairy Equalization Fund. The next three sections of this brief demonstrate that these provi-

¹⁵ Such states include a net exporting state (Maine, see Me. Rev. Stat. Ann. tit. 36, § 4541 (West 1992), enacted by 1991 Me. Laws ch. 526, amended and extended by 1993 Me. Laws ch. 104, § 2, and 1993 Me. Laws ch. 274, §§ 3-5), a state with both large production and large consumption (New York, see N.Y. Agric. & Mkts. Law, § 258-m (Consol. Laws Supp. 1993), as amended by 1991 N.Y. Laws ch. 84; N.Y. Comp. Codes R. & Regs. tit. 1, pt. 22 (1991)) and a Midwestern production state (Minnesota, see Minn. Stat. Ann. § 32A.071 (West Supp. 1993), enacted by 1992 Minn. Laws ch. 602, superseded by Minn. Stat. Ann. § 32.73, enacted by 1993 Minn. Laws ch. 65). See also Brief of Cumberland Farms, Inc. as *Amicus Curiae* at 13. Though not cited in its *amicus* brief in this Court, Vermont, another export state, enacted statutory authority to implement such an order (see Vt. Stat. Ann. tit. 6, § 2924(e) (West Supp. 1993), enacted by 1991 Vt. Laws No. 232 (Adj. Sess.), § 9), although it apparently has not implemented this statute.

sions have the same purposes and effects as lawful assessments (or taxes) and subsidies upheld by this Court.

1. The Subsidy To Massachusetts Farmers Does Not Violate The Commerce Clause.

Funds received under the Milk Order are paid into a fund on the books of the Commonwealth, from which the State Treasurer (not the Department of Food and Agriculture, see Pet. Br. at 28) disburses subsidies pursuant to the Milk Order. Mass. Gen. Laws, c. 29, § 2V. The limitation of these subsidies to Massachusetts farmers is lawful under the Commerce Clause.¹⁶

This Court has stated:

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

Limbach, 486 U.S. at 278 (emphasis in original) (discussing Indiana cash subsidy for in-state ethanol producers).

Although the petitioners attack the Milk Order as a whole, they virtually concede the legality of limiting subsidies to in-state residents. They propose that "the state could subsidize its in-state dairy producers without violating the Commerce Clause" by, for example, "provid[ing] dairy farmers with tax subsidies from the Commonwealth's general tax fund . . ." (Pet. Br. at 32). Accord,

¹⁶ Their argument that the distributions are not real "subsidies" is addressed below at 30-35.

Brief of the Milk Industry Foundation ("MIF") *et al.* as *Amici Curiae* at 26.¹⁷

A number of authorities support the principle that the States may subsidize local industry, without also subsidizing out-of-state companies.¹⁸ For instance, Maryland may affect the market by paying a "bounty" to licensed in-state businesses that destroy any abandoned automobile formerly titled in Maryland. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 797, 809-10 (1976). "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810 (footnote omitted). Concurring in *Alexandria Scrap*, Justice Stevens observed that "the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business" and that "a cash

¹⁷ *Amicus* Vermont granted cash subsidies to certain Vermont dairy farmers in the recent past. See Vt. Stat. Ann. tit. 6, §§ 2991 *et seq.* (West 1988) (effective May 19, 1988 through April 30, 1989), repealed by 1991 Vt. Laws 79, § 7. States promote the dairy industry with public funds in other ways. See, e.g., Cal. Food & Agric. Code, Div. 22, c. 1, § 64181 (West 1986) (Dairy Council of California Law); N.Y. Agric. and Mkts Law, Art. 21-AA, § 258-aa (Consol. Laws Supp. 1993) (Dairy Promotion Act); Vt. Stat. Ann. tit. 6, § 2951 (West Supp. 1993) (separate "Vermont dairy promotion fund"); Vt. Stat. Ann., tit. 6, § 2964 (West Supp. 1993); Code Vt. Rules 20011004 (Weil 1993) (Vermont "Seal of Quality").

¹⁸ See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984) (Opinion of White, J.) (implicitly accepting subsidies to in-state timber processors); *Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring). Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 473-75 (1989); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1193-1202 (1986).

subsidy . . . should not be characterized as a 'burden' on commerce." *Id.* at 815-16.¹⁹

In *Alexandria Scrap*, the State made payments on a per-hulk basis and was "a purchaser, in effect, of a potential article of interstate commerce" even though it did not acquire legal title to the automobile hulks. *Id.* at 808. See also *id.* at 824 (Brennan, J., dissenting). Massachusetts, too, is a "purchaser, in effect" and, like Maryland, is acting to preserve aesthetic values and quality of life for all its citizens. The Milk Order pays a fixed amount per hundredweight of milk, subject to a cap based upon volume. Like the Maryland payments, the Milk Subsidy uncontestedly comes from funds collected by the Commonwealth at significant local expense, whether that be the increase in milk prices for Massachusetts consumers as alleged by the dealers or the increased costs borne by Massachusetts dealers like the petitioners themselves. See Regan, *supra*, 84 Mich. L. Rev. at 1201. See also below, p. 27, n.23. If Massachusetts may not subsidize farmers to counteract the adverse social, economic, educational and environmental consequences of the failure of the market to sustain farming in the state, then a broad range of state welfare and spending programs may be called into question.

¹⁹ While it has been argued that there are some, legally irrelevant, respects in which "subsidies resemble tariffs," the fact remains that (1) "for at least formal reasons, subsidies are *always* different from tariffs," (2) subsidies "present visible preferences of one in-state constituency over another" and thus may encounter legislative resistance and (3) identifying the rare, truly dangerous subsidy is unmanageably difficult. Coenen, *supra*, 88 Mich. L. Rev. at 478-79. "The traditional tolerance of subsidies is also important," for people have come to rely upon States' ability to subsidize and may "perceive subsidies as fair interstate competition and not as a point of special offense . . ." Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1134-37 (1988).

The Milk Order has an even more benign impact upon interstate commerce than most subsidies, since it has been found necessary to preserve commerce generated by a Massachusetts dairy industry that is in danger of collapse. 415 Mass. at 10, 11 & n.8, 17, 611 N.E.2d at 240, 241 & n.8, 244 (J.A. 29-31, 121 n.8, 128). The need to pay off farm debt and to invest reduces the likelihood that the subsidy will be devoted to price reductions by dairy farms (see J.A. 21-22).²⁰ Moreover, land is unique, so that any attempt to preserve open space in Massachusetts through an agricultural subsidy program *must* be directed toward Massachusetts farmers. The decision not to subsidize out-of-state farmers, particularly in these circumstances, is entirely lawful.

While the petitioners at bottom urge that the market should be permitted to diminish or eliminate dairy farming in Massachusetts, the Commonwealth is not bound to accept *laissez-faire* principles or any other "particular economic theory." *CTS Corp.*, 481 U.S. at 92. See Regan, *supra*, 84 Mich. L. Rev. at 1096-97, 1124. It may attempt to counter the "pressures of creeping urbanization." See Brief of *Amicus Curiae* Vermont at 15. The States' attempts to prevent decimation of local dairy farms do not conflict with the national policy of promoting an interstate common market.

²⁰ Such price reductions (subject to federal *minima*) would, themselves, be an entirely lawful effect of subsidies, since the farmers' decisions would result from "market forces, including that exerted by money from the State." *Alexandria Scrap*, 426 U.S. at 810.

2. The Assessment Upon All Milk Consumed In Massachusetts Is Evenhanded and Lawful.

Obviously, the subsidies to farmers must be funded. The purpose of the Milk Assessment is plain: to raise funds from the sale of milk consumed in Massachusetts, wherever that milk was produced. The Milk Assessment comports with the Commerce Clause because "the Commerce Clause is not offended when state boundaries are economically irrelevant" to a state assessment, as here. See *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987) (state vehicle registration fee). The petitioners contend, however, that the Assessment is discriminatory. They appear to argue (Pet. Br. at 16, 23) that the Commonwealth adopted the Milk Assessment, rather than an in-state minimum price, in order to avoid loss of business to dairy farmers from other states. They urge that a State may impose *only* those in-state minimum prices or other measures that, by their nature, raise the cost of local goods, but not of out-of-state goods.

The argument that States can only impose laws that place in-state goods at a disadvantage was rejected in *Henneford*, 300 U.S. at 586.²¹ In *Henneford*, this Court upheld a use tax, imposed upon goods purchased outside of Washington state, in the same amount as the sales tax applicable to in-state purchases.²² The

²¹ As Justice Cardozo noted in *Henneford*, "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved." 300 U.S. at 586 (citations omitted).

²² Regan, *supra*, 84 Mich. L. Rev. at 1192 n.194, discusses *Henneford* among the movement-of-goods cases, because "*Henneford* involves a tax, but it does not involve the national interest in avoiding multiple taxation which makes tax cases special."

Court upheld the use tax, because Washington treated in-state and out-of-state goods equally, even though the state's tax system had the same effects that are alleged to be discriminatory here:

One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Henneford, 300 U.S. at 581. The Court held that these effects were consistent with the Commerce Clause and rejected the notion that "[c]atch words and labels, such as the words 'protective tariff'" apply to such a tax. *Id.* at 586. See also *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331-32 (1977).

So here, the petitioners' characterization of the nondiscriminatory assessment upon milk consumed in Massachusetts as a tariff or other protectionist measure must fail. The Assessment neither discriminates against interstate commerce nor imposes any burden upon the act of importation itself. Massachusetts indisputably would have the authority to impose a tax on sales of milk for consumption in Massachusetts. See *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 349 (1944). Under *Henneford*, 300 U.S. at 581, it would be lawful to impose an additional tax on the use (or consumption) of all milk in Massachusetts not otherwise taxed (including interstate milk) even if, as a result, out-of-state companies lost the advantage they would have had if only Massachusetts companies were subject to the tax. Such a tax would not be protectionist, because it would not create an advantage for Massachusetts competitors; it would

only remove a disadvantage created by the sales tax. See *Regan*, *supra*, 84 Mich. L. Rev. at 1246-47. The fact that Massachusetts has chosen to impose a single assessment upon all milk consumed in-state, rather than a sales tax, with a compensating tax upon use, makes no difference for Commerce Clause purposes.²³

The States' "independent and uncontrollable authority to raise their own revenues for the supply of their own wants" (The Federalist No. 32 (Hamilton)) has repeatedly been held sufficient to justify an evenhanded levy upon all goods consumed within a State even if the products originated in interstate commerce. See *Goldberg*, 488 U.S. at 259-65; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 46-47 (1940); *Henneford*, 300 U.S. at 586; *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123, 140 (1868). This rule serves "to insure the harmonious operation of powers reserved to the states with those conferred upon the

²³ While the Milk Order does not technically impose a "tax," see, e.g., *United States v. Butler*, 297 U.S. 1, 58-59, 61 (1936); *Howes Brothers Co. v. Unemployment Compensation Comm'n*, 296 Mass. 275, 284, 5 N.E.2d 720, 726 (1936), cert. denied, 300 U.S. 657 (1937), the economic effect of the Milk Assessment on interstate commerce is the same as that of a tax, as even the petitioners' expert conceded (J.A. 70). Under the Commerce Clause, "the critical consideration is the overall effect of the [law] on both local and interstate activity." See *Brown-Forman Distillers v. New York Liquor Authority*, 476 U.S. 573, 579 (1986), citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440-41 (1978). This "critical consideration" does not depend upon whether a particular assessment technically qualifies as a "tax." To establish a distinction between taxes and assessments, for purposes of evaluating at least the questions of discrimination and effect upon commerce, would be to return to the sort of formalism, without grounding in the Commerce Clause itself, that this Court has rejected. See *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983) and cases cited. See also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

national government" even if the state law "in some measure affect[s] the commerce or increase[s] the cost of doing it." *McGoldrick*, 309 U.S. at 48. Companies engaged in interstate commerce cannot claim "a privileged position" to avoid paying "their just share of state tax burden even though it increases the cost of doing business." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981) (internal quotation marks and citations omitted). Accord *International Harvester*, 322 U.S. at 349.

The petitioners suggest (Pet. Br. at 20-21, 29) that the Milk Assessment upon dealers is discriminatory because it funds a subsidy—granted to a wholly separate level of the industry, namely to farmers. This does not make the Assessment protectionist. The Commonwealth has not imposed a general levy, with exemptions or rebates that reduce the net liability of in-state operations that are assessed. Compare *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 240-48 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963). No Massachusetts subsidy goes to the handling and processing operations of dealers who are liable for the assessment. See *Wyoming*, 112 S. Ct. at 800 ("economic protectionism" refers to burdens on "out-of-state competitors") (emphasis added).²⁴

²⁴ The petitioners and their *amici* have, quite correctly, not raised any issue regarding integrated milk production and processing. They submitted no record evidence of any such operations, and the only milk cooperative discussed in any of their briefs does not process Class I milk subject to the Assessment. See Brief of *Amicus* Vermont at App. 1. In any event, the Milk Order makes the processing operations of "farmer-dealers" fully liable for the Assessment, just like a non-integrated operation. Any subsidy would be paid solely on account of a farmer-dealer's milk production operation, regardless of the location of any processing operations, and would therefore be consistent (continued...)

There is no discrimination where the subsidized farming operations *do not compete* with the dealers' processing operations. Compare *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (upholding Alaska tax scheme because freezer ships that paid 4% tax upon salmon "do not compete with" local fish processors who paid a 1% tax) and *Parker v. Brown*, 317 U.S. 341, 362 (1943) (upholding California system that benefited local raisin growers at the expense of distributors and consumers) with *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 n.7 (1984) (invalidating tax where the out-of-state taxpayer and the exempt in-state manufacturers competed "in precisely the same business of wholesaling" in the taxing state). See also Regan, *supra*, 84 Mich. L. Rev. at 1095-96 (noting that "producers (as such) do not compete with distributors (as such) or with consumers (as such)"); Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1225-28 (1986).²⁵

It follows that the Milk Assessment is a non-discriminatory means of collecting funds that comports with the Commerce Clause.

²⁴(...continued)
with the State's purpose of preserving agriculture and unique open space in Massachusetts.

²⁵ Professor Varat likewise argues that the Commerce Clause prohibits "subsidizing *the* in-state businesses" that are subject to a particular tax, but counsels against a rule that would "strike down a state expenditure of funds collected for the primary purpose of serving residents, just because the immediate objective of the expenditure is to attract industry, employment, and commercial prosperity to, or to keep it in, the subsidizing state . . ." Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 541-42, 544-45 & n.205 (1981) (emphasis added).

3. The Linkage Of The Milk Assessment And The Milk Subsidy Does Not Invalidate The Milk Order Under The Commerce Clause.

The petitioners' principal argument appears to be that, in its entirety, the Milk Order violates the Commerce Clause due to the linkage of the Assessment and Subsidy pursuant to Massachusetts statute. Mass. Gen. Laws c. 29, § 2V (1992).²⁶ First, they claim that the combination of the Assessment and payments to farmers divests the payments of any character as a subsidy (Pet. Br. at 28-31). Second, they claim that, in its entirety, the Milk Order essentially regulates prices paid to farmers for out-of-state milk (Pet. Br. at 17-19, 23-25).

- a. Use of a special state fund to collect the assessment and pay the subsidy raises no Commerce Clause issue.

In order to assure that subsidies actually reach dairy farmers, the Commonwealth established the Dairy Equalization Fund within its Treasury.²⁶ Petitioners concede that an agricultural "subsidy" from the Treasury's general fund would be constitutional but argue in this Court that use of the Dairy Equalization Fund precludes the Milk Subsidy from being a true subsidy (Pet.

²⁶ Despite the petitioners' protestations to the contrary (Pet. Br. at 29), the general fund of the state treasury consists, in significant part, of monies paid by out-of-state residents. See, e.g., Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1312, 1318-19, 1322 & n.73 (1974).

Br. at 29, 31, 32).²⁷ Since the Milk Assessment and the Milk Subsidy are lawful, taken separately, it would be surprising if the dormant Commerce Clause somehow prohibited the state financial structure that combines these two measures. Analysis of the constitutional principles at issue demonstrates that such matters lie outside the scope of the dormant Commerce Clause.

The issue is essentially one of accounting—one that matters to the States but does not implicate national interests in interstate commerce. The Milk Order's accounting provisions serve important interests of the Commonwealth, the farmers and even the milk dealers. As now structured through a segregated account, the funds from the Assessment are strictly limited to the payment of the Subsidy. Any receipts in excess of subsidy expenditures are refunded to the dealers, including petitioners. Eliminating the segregated fund and depositing payments into the general fund would increase the political risk that the money would be used not only for the subsidy program, but also to defray "the cost of providing *all* governmental services" See *Goldberg*, 488 U.S. at 267 (quoting *Commonwealth Edison*, 453 U.S. at 627 n.16). Massachusetts milk dealers cited their fear of this very risk—"that the money will be deposited into the general fund and appropriated for other uses"—in their testimony

²⁷ Petitioners acknowledged in the Supreme Judicial Court that the Order created a "subsidy." Brief for Plaintiffs-Appellants at 24-26 (Mass. SJC No. 6140). While petitioners do not define "subsidy," the Milk Order easily fits the dictionary definition proffered by *Amici MIF et al.* (Br. at 24)—"a grant of funds . . . from a government . . . to a private person or company . . . as a simple gift or a payment in excess of the usual charges for a service"—a definition that contains no requirement of distribution from the general fund of the State Treasury.

to the Governor's Special Commission (J.A. 22-23).²⁸ The State's choice of the segregated account system thus assures that the State will keep its promises to dealer and farmer alike.

In contrast to the State's interest in having a segregated fund, the Commerce Clause is simply not concerned with the particular manner in which the State accounts for its receipts and expenditures. State accounting principles do not implicate the purpose of the Commerce Clause "to create an area of free trade among the several States." See *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402-03 (1984) (quoting *Boston Stock Exchange*, 429 U.S. at 328); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949). The Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce" and does not authorize Congress to commandeer the machinery of state government. *New York v. United States*, 112 S. Ct. 2408, 2420, 2423 (1992). If Congress, to which the Commerce Clause is expressly addressed, lacks such power,²⁹ it would be anomalous to hold that the mere negative implication of the Clause places the Court in the position of evaluating the particular machinery the State chooses in order to accomplish its farm subsidy purposes. Just as the Spending Clause "does not mandate a particular form of accounting" and allows Congress to structure

²⁸ The Massachusetts Legislature did not pass a bill that would have used receipts from Milk Assessments for purposes in addition to a dairy farm subsidy, including the Commonwealth's Women, Infants and Children program and acquisition of agricultural preservation restrictions. See 1991 Mass. House Doc. No. 4390, § 3.

²⁹ Apart from regulation of the machinery of state government, Congress plainly has the power to enact express legislation prohibiting much, if not all, state participation in the market. See, e.g., *Wisconsin Dep't Of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286-91 (1986).

federal spending through "segregated trust funds collected and spent for a particular purpose," *id.*, 112 S. Ct. at 2426, so the States retain the power under the Commerce Clause to structure their governmental funds and finances in particular ways to accomplish public purposes.³⁰

This Court touched upon an analogous issue when it rejected an argument that the payment of fifty percent of Montana's severance tax into a trust fund prevented the tax from being a general revenue tax. Commerce Clause analysis did not turn upon this state fiscal distinction:

Nothing in the Constitution prohibits the people of Montana from choosing to allocate a portion of current tax revenues for use by future generations.

Commonwealth Edison, 453 U.S. at 621 n.11.

The substantial protection afforded by state political processes pertains when the challenged regulation adversely affects major in-state interests (such as petitioners), even if there is no disbursement from the state treasury at all. See above, p. 18 (citing *Goldberg*, 488 U.S. at 266; *Kassel*, 450 U.S. at 675; *Clover Leaf Creamery*, 449 U.S. at 473). In such situations, this Court has wisely declined to look beyond the overall question of in-state impact to evaluate the efficacy of particular state political mechanisms.

To hold that the validity of the Milk Order turns upon linking an otherwise valid assessment and subsidy through a dedicated fund in the treasury would expand dormant Commerce Clause

³⁰ Another example of a dedicated revenue fund appears in *McGoldrick*, 309 U.S. at 42, where revenues from the lawful New York City sales tax upon in-state and out-of-state goods consumed in the city were "to be used exclusively for unemployment relief."

jurisprudence into an entirely new area. It would authorize federal scrutiny into the purposes for which the State chooses to collect and disburse funds. This "would threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse," contrary to the principles of "federalism and good government." *Reeves*, 447 U.S. at 441. Moreover, to make constitutionality turn upon whether subsidies are distributed from the general fund or a dedicated fund would return Commerce Clause jurisprudence to the type of formalism rejected by this Court. See above, pp. 27, n.23. See also *Henneford*, 300 U.S. at 587 (declining to inquire whether the form of a use tax was "a subterfuge" for what was effectively a tax upon a foreign sale).³¹

Questioning the nature of the particular political process involved in each case would create unmanageable problems. There is no constitutional basis for distinguishing the level of deference given to a legislatively authorized state executive milk order, as opposed to a state statute setting up a special fund within the state treasury, as opposed to funding from the state's general fund. All three are equally products of the "Republican Form of Government" guaranteed the states by Article IV,

³¹ Some courts have suggested that *Henneford* does not apply to a milk assessment because the use tax in that case "went to the general coffers of the state, not to the Washington retailers." *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1252 (S.D.N.Y. 1992). Accord, *Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714, 722 (D. Minn. 1992) (preliminary injunction). But see *Opinion of the Justices*, 601 A.2d 610, 617-619 (Me. 1991); *Cumberland Farms, Inc. v. Lafaver*, D. Me. No. 92-70-P-H (August 3, 1993), appeal docketed, No. 93-2066 (1st Cir.), reproduced in *Cumberland Farms amicus br.* at 22a-32a. These courts offer no rationale for treating assessments and dedicated revenue funds differently from use taxes under the Commerce Clause.

Section 4, of the United States Constitution. Applying different levels of deference would present difficult management and uniformity problems in the numerous state and federal lower courts. The distinction would also create anomalies by invalidating identical state laws based solely upon the State's method of enactment.

It follows that the linkage of the Milk Assessment and the Milk Subsidy, through the Dairy Equalization Fund set up by Mass. Gen. Laws c. 29, § 2V, presents no difficulty under the Commerce Clause.

- b. Linkage of the assessment and the subsidy does not constitute extraterritorial price regulation.

Claiming that the Milk Order in its entirety amounts to an extraterritorial pricing scheme, the petitioners also attempt to bring this case within the prohibition described in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Since the Milk Order is not an extraterritorial pricing scheme, this claim must fail.

In *Baldwin*, the State of New York had enacted a law prohibiting the sale of out-of-state milk unless "the price paid to the producers was one that would be lawful upon a like transaction within the state." *Baldwin*, 294 U.S. at 519. Since New York had a system of minimum milk prices in effect, the challenged law required payment of the New York minimum price to Vermont farmers if Vermont milk was to be sold in New York. In an opinion by Justice Cardozo, the Court viewed the New York system as "a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. The Court said that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to produc-

ers in another." *Id.* at 524. The defect in *Baldwin* was that the New York scheme was "equivalent to a rampart of customs duties." See *Limbach*, 486 U.S. at 275 (quoting *Baldwin*, 294 U.S. at 527).

Another opinion by Justice Cardozo limits the principle set forth in *Baldwin*. *Henneford*, 300 U.S. 577. Viewing the *Baldwin* case as originating in facts that were "far apart" from an evenhanded Washington state use tax, the Court expressly distinguished its earlier decision:

New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

Henneford, 300 U.S. at 585-86.

The Milk Order creates a system like the Washington use and sales tax scheme upheld in *Henneford*. Under the Milk Order, out-of-state farmers may ship milk "in such amounts and at such prices" as each farmer pleases, subject to federal pricing regulation. Milk that is consumed in Massachusetts will, even if produced out-of-state, "share an equal burden with goods that have been purchased here." It follows that *Baldwin* does not govern here, and that *Henneford* validates the Milk Order.

From an economic perspective, as well, the Milk Order does not establish extraterritorial prices. The Milk Assessment is calculated independently of the prices paid to out-of-state farmers and does not even attempt to regulate the out-of-state purchase and sale transaction at all.³² Subject only to federal limits, an out-of-state farmer with a price or other advantage "belonging to the place of origin" (*Baldwin*, 294 U.S. at 527) may exploit that advantage fully by raising or lowering its price. See *Varat, supra*, 48 U. Chi. L. Rev. at 543. Unlike most "prices," the Milk Order makes refunds available if the receipts exceed the disbursements in the Subsidy program. The Assessment is imposed only upon the milk dealer and, as such, constitutes what the Supreme Judicial Court correctly called "one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay." 415 Mass. at 19, 611 N.E.2d at 245 (J.A. 130).

Costs of business arising from many sources (including some state-mandated costs such as corporate franchise taxes, mandatory insurance, and the like) cannot tenably be characterized as "prices" within the meaning of *Baldwin*.³³ See *id.* at 16, 19, 611 N.E.2d at 243, 245 (J.A. 128, 130). Unless the Commerce Clause is expanded beyond containable bounds, a mere increase in cost

³² In addition, if any price is involved, it is an *in-state price paid by the State*, not by the dealer. Where the Subsidy is concerned, only the State "has entered into the market itself to bid up [the] price," and therefore only the State is the "purchaser" to the extent of the Milk Subsidy. *Alexandria Scrap*, 426 U.S. at 806, 808. See above, pp. 22-23.

³³ The petitioners (Pet. Br. at 13, 30) make much of the Commissioner's statement that the "Order sets a target minimum price" (J.A. 32), but the statement signifies only that the Order is within the Commissioner's broad state law authority to regulate "prices, terms and conditions relative to milk" under Mass. Gen. Laws c. 94A, §§ 10, 11. That facet of state law has nothing to do with Commerce Clause extraterritoriality issues.

that results from state mandates cannot be equated with the extraterritorial price regulations at issue in *Baldwin and Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). See above pp. 27-28. In particular, an assessment upon consumption—like “a tax upon use”—“is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business.” See *Henneford*, 300 U.S. at 586.

Finally, any attempt to equate the Order with out-of-state prices fails as a factual matter. The federal minimum prices depend primarily on the price of manufacturing grade milk sold in Minnesota and Wisconsin, not upon the price at which milk is sold in Massachusetts. See 7 C.F.R. § 1001.51 (determining “basic formula price” relied on in calculations under § 1001.50 and other provisions of Federal Milk Marketing Order No. 1). Any factual argument regarding effects on premium prices (payments by dealers in excess of the federal minimum)³⁴ was rejected below. 415 Mass. at 17 & n.13, 611 N.E.2d at 244 & n.13 (see J.A. 88-89, 95-96, 128 & n.13).³⁵ Even if true, a re-

³⁴ No reason appears why the dormant Commerce Clause would mandate preservation of premium prices above the federal minimum, when Congress has decided to leave premium pricing federally unregulated. Cf. *United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n of Pennsylvania*, 335 F. Supp. 1008, 1014-15 (M.D. Pa.) (three judge court) (state prices above federal minimums not preempted by Agricultural Marketing Agreement Act of 1937, as amended), aff'd, 404 U.S. 930 (1971); *Crane v. Commissioner of Dep't of Agriculture, Food & Rural Resources*, 602 F. Supp. 280, 290-93 (D. Me. 1985) (same). See also *Stark v. Wickard*, 321 U.S. 288, 291 (1944).

³⁵ The petitioners conceded in their brief in the Supreme Judicial Court that “it is unnecessary to explore the differences between the Zone 21 price and the market price.” Brief for the Plaintiffs-Appellants at 6 n.4 (Mass. SJC No. 6140). Despite the facts found in this case, *Amici MIF, et al.*, attempt to
(continued...)

duction in premium payments caused by increased costs to dealers due to the Milk Assessment would be the lawful effect of an evenhanded assessment upon all milk consumed in Massachusetts. Increased costs do not invalidate evenhanded levies, despite their likely effect upon prices at some level of industry. See above, p. 28.

In short, an assessment upon milk consumed in Massachusetts, followed by a subsidy to Massachusetts farmers is not an extraterritorial price. The Milk Order resembles milk laws that this Court has upheld under the Commerce Clause on the ground that they affect only the essentially local activities of milk sales and production. See *Eisenberg Farm Products*, 306 U.S. at 352-53; *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 614-15 (1937); *Schwegman Bros. Giant Super Markets v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three judge court), aff'd, 416 U.S. 922 (1974); *United Dairy Farmers Coop. Ass'n v. Milk Control Comm'n of Pennsylvania*, 335 F. Supp. 1008, 1014 (M.D. Pa.) (three judge court), aff'd, 404 U.S. 930 (1971).

³⁵(...continued)

explore the matter through hypothetical examples that would apply equally to the use tax in *Henneford* (*MIF Amicus Br.* at 6, 20) or that prove nothing more than that the Assessment is a cost to the dealer and that the Subsidy generates added revenue for Massachusetts farmers (*MIF Amicus Br.* at 23).

II. THE BENEFITS OF THE MILK ORDER OUT-WEIGH ANY BURDEN UPON INTERSTATE COMMERCE.

While the Supreme Judicial Court afforded petitioners the benefit of the *Pike* balancing test (above, pp. 11-12), there is no occasion for application of this test at all. The Milk Assessment, as a non-discriminatory measure applied to in-state milk consumption, easily passes the *Complete Auto Transit* test (see 430 U.S. at 279, 285, 287), which does not include *Pike* balancing. See *Commonwealth Edison*, 453 U.S. at 625-26; *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 746-47, 750-51 (1978). See also, Tribe, *American Constitutional Law*, § 6-15 at 441 (2d ed. 1988). The Milk Subsidy is lawful because subsidies are not "the kind of action with which the Commerce Clause is concerned," *Alexandria Scrap*, 426 U.S. at 805, without regard to *Pike* balancing. The same analysis should apply to use of a dedicated revenue fund. Perhaps implicitly recognizing the inappropriateness of balancing in this case, the petitioners' brief (Pet. Br. at 31-33) does not really engage in balancing at all, apart from a discussion of possible alternatives the Commonwealth might have chosen. See below, pp. 41-42.

In any event, the prior sections of this brief show that, given the lawful purpose of the Milk Order to prevent the collapse of Massachusetts' dairy farming industry, any burden on commerce is merely "incidental and not forbidden by the Constitution." See *Eisenberg Farm Products*, 306 U.S. at 353. While the State's interests in protecting the Massachusetts dairy industry from collapse and in protecting unique open space and related benefits were established, the petitioners simply failed below to prove substantial effects upon commerce within the meaning of the Commerce Clause. See above, pp. 9-10. Often, in Commerce

Clause litigation, "constitutionality is conditioned upon the facts." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447-48 n.25 (1978) (quoting Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 27-28 (1940)). This is certainly true where, as here, petitioners claimed that the Milk Order would have certain economic effects, which were not proven as a matter of fact. The petitioners have waived or been unsuccessful in state court in any attempt to attack the fact findings, see above pp. 11-12; and this Court does not sit to review facts found by state officials and courts. See *Clover Leaf Creamery*, 449 U.S. at 463 n.7, 471 n.15. Cf. *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986) (even in federal court, fact finding is for the trial courts).

The analysis of the effects of the Order undertaken by petitioners and their *amici* demonstrate nothing more (and, on the facts as found, considerably less, see above, p. 24) than the sum of the usual effects of an evenhanded assessment plus the effects of an in-state subsidy. As the Supreme Judicial Court held, the Assessment increases the costs of doing business in Massachusetts and the Subsidy aids Massachusetts farmers, but neither of these effects constitutes an undue burden upon commerce.

The petitioners also do not demonstrate why their proposed alternatives would have any less effect upon commerce. Several alternatives (subsidies from the general fund or various forms of tax relief) might have less impact upon the petitioners themselves, but not "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. See *Exxon*, 437 U.S. at 127-28.³⁶ Other alterna-

³⁶ The petitioners' tax relief suggestion would have a lesser effect on commerce only in the trivial and immaterial sense that all purely local tax measures (such as a real property tax) affect interstate commerce less than lawful, evenhanded assessments upon both in-state and out-of-state residents.

(continued...)

tives (aid to research or in-state minimum prices) are "unproven means of protection," *Taylor*, 477 U.S. at 147, and are "less likely to be effective." *Clover Leaf Creamery*, 449 U.S. at 473.

In sum, any alleged "burden" on commerce due to the absence of a subsidy for out-of-state farmers is outweighed by the "local benefits" of preserving the Massachusetts dairy industry. Massachusetts is not compelled to surrender the character and industry of its rural areas in the interest of any clearly overriding policy set forth in the Commerce Clause, for no such federal policy exists.

Conclusion.

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

By his attorneys,

SCOTT HARSHBARGER

*Attorney General
of Massachusetts*

DOUGLAS H. WILKINS

ERIC A. SMITH*

Assistant Attorneys General

**Counsel of Record*

Dated: December 14, 1993

³⁶(...continued)

See Note, *State Taxing Schemes Discriminating in Violation of the Foreign Commerce Clause: Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 46 Tax Lawyer 555, 563 & text at n.66 (1993).

14
No. 93-141

Supreme Court, U.S.
FILED
JAN 4 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC., PETITIONERS

V.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONERS

STEVEN J. ROSENBAUM
ROBERT A. LONG, JR.
JONATHAN R. GALST
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044
(202) 662-6000

MICHAEL L. ALTMAN*
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, MA 02110
(617) 330-7000

Attorneys for Petitioners

*Counsel of Record

BEST AVAILABLE COPY

22 PP

TABLE OF AUTHORITIES

Cases	Page
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	2, 4, 5, 7, 10
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	2, 4, 5, 15, 17
<i>Brown-Forman Distillers Corp. v.</i> <i>New York State Liquor Authority</i> , 476 U.S. 573 (1986)	2, 7, 16
<i>Committee for Public Education & Religious</i> <i>Liberty v. Nyquist</i> , 413 U.S. 756 (1973)	8
<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	16
<i>Complete Automobile Transit, Inc. v.</i> <i>Brady</i> , 430 U.S. 274 (1977)	8, 16
<i>Cumberland Farms, Inc. v. LaFaver</i> , 834 F. Supp. 27 (D. Me. 1993)	17
<i>Farmland Dairies v. McGuire</i> , 789 F. Supp. 1243 (S.D.N.Y. 1992)	17
<i>Halliburton Oil Well Cementing Co. v.</i> <i>Reily</i> , 373 U.S. 64 (1963)	7
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	2, 11, 12, 15
<i>Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	5, 17

II

<i>Hunt v. Washington State Apple Advertising Commission</i> , 432 U.S. 333 (1977)	11
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	16
<i>Marigold Foods, Inc. v. Redalen</i> , 834 F. Supp. 1163 (D. Minn. 1993)	17
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981)	7
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	2
<i>New Energy Co. v. Limbach</i> , 486 U.S. 269 (1988)	1, 6, 8, 9, 10
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	4, 5
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	16
<i>Polar Ice Cream & Creamery Co. v. Andrews</i> , 375 U.S. 361 (1964)	5
<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1 (1989)	8
<i>Tyler Pipe Industrial, Inc. v. Washington State Department of Revenue</i> , 483 U.S. 232 (1987)	11
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970)	8
<i>Wyoming v. Oklahoma</i> , 112 S. Ct. 789 (1992)	1, 4, 5

III

MISCELLANEOUS

Dan T. Coenen, <i>Untangling the Market-Participant Exemption to the Dormant Commerce Clause</i> , 88 Mich. L. Rev. 395 (1989)	9
Richard B. Collins, <i>Economic Union As A Constitutional Value</i> , 63 N.Y.U. L. Rev. 43 (1988)	9, 11
Donald H. Regan, <i>The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause</i> , 84 Mich. L. Rev. 1091 (1986)	9
Jonathan D. Varat, <i>State "Citizenship" and Interstate Equality</i> , 48 U. Chi. L. Rev. 487 (1981)	9, 11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-141

WEST LYNN CREAMERY, INC., AND
LECOMTE'S DAIRY, INC., PETITIONERS

v.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONERS

Respondent does not dispute the basic principles that govern this case: "the Commerce Clause prohibits economic protectionism," *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); a state law that "amounts to simple economic protectionism" is subject to "a virtually *per se* rule of invalidity," *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800

(1992) (quotation omitted); and "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, or discriminatory effect," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citation omitted); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). Respondent's effort to defend the Massachusetts Pricing Order under these principles is wholly unpersuasive. The stated purpose of the Pricing Order is to protect the Massachusetts dairy industry from out-of-state competition. And the "overall effect" of the Order, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), is blatantly protectionist.

1. Petitioners' opening brief demonstrated (Pet. Br. 17-25) that this case is largely controlled by *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), a decision respondent ignores until the end of his brief. See Resp. Br. 35-38.^{1/} The *Baldwin* Court unanimously held that the State of New York could not require milk processors to pay a state-established minimum price to out-of-state farmers, because such a requirement had "the aim and effect of establishing an economic barrier against competition with the products of another state." 294 U.S. at 527.

The Massachusetts Pricing Order has precisely the same aim and effect as the New York law struck down in *Baldwin*. Massachusetts, like New York, seeks to protect its dairy industry from out-of-state competition by ensuring that its farmers receive a state-established minimum price for their milk. Massachusetts, like New York, seeks to prevent its

^{1/} Respondent's sole argument is that *Baldwin* is distinguishable under this Court's decision in *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). See Resp. Br. 35-38. As we show, see pp. 11-12 *infra*, respondent is incorrect; *Henneford* is not applicable because the Massachusetts Pricing Order places an unequal burden on out-of-state milk, and requires out-of-state dairy farmers to surrender their competitive advantages.

farmers from losing sales to out-of-state farmers. If Massachusetts had required milk processors to pay the "Massachusetts premium" (the difference between the federal minimum price and the Massachusetts minimum price) directly to out-of-state farmers, the Order would be essentially identical to the law invalidated in *Baldwin*. The Massachusetts Pricing Order differs only by requiring that the premiums on sales by out-of-state farmers be paid to in-state farmers. Thus, the Massachusetts Pricing Order is even worse than the New York law struck down in *Baldwin*. The Pricing Order not only sets a minimum price for out-of-state milk, but also facially discriminates against out-of-state farmers and their customers. This facial discrimination against out-of-state farmers is an *additional* reason why the Order is unconstitutional; it cannot possibly render a *Baldwin* scheme constitutional.

2. Respondent's discussion of the purpose of the Pricing Order (Resp. Br. 16-20) ignores its *stated* purpose, which is economic protectionism. The Order states that its purpose is to "provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry" by "set[ting] a target minimum price to be paid by milk dealers to Massachusetts producers" under "terms and conditions" that "take into consideration the regional nature of the flow of milk." J.A. 32. Similarly, respondent's findings in support of the Order state that "we must act . . . to preserve our local industry" and "maintain reasonable minimum prices for the dairy farmers," and that "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." J.A. 29, 31. A clearer statement of a protectionist purpose is difficult to imagine.

Respondent nevertheless contends (Resp. Br. 16) that the purpose of the Order is "solely to save an industry from collapse" (quoting J.A. 128), and that this purpose is not protectionist in nature. That simply is not so. It is well

settled that "the propriety of economic protectionism may not be allowed to hinge upon the State's — or this Court's — characterization of the industry as either 'thriving' or 'struggling.'" *Bacchus Imports*, 468 U.S. at 273. Moreover, "it is irrelevant to the Commerce Clause inquiry that the motivation of the [State] was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Id.*

Respondent broadly asserts that "States may enact laws 'that have the purpose and effect of encouraging domestic industry.'" Resp. Br. 16-17 (quoting *Bacchus Imports*, 468 U.S. at 271). Respondent omits the very next sentence of the Court's opinion in *Bacchus Imports*, which adds that "the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." 468 U.S. at 271. Accordingly, this Court has "often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by 'the illegitimate means of isolating the State from the national economy.'" *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)). That is precisely what Massachusetts is attempting to do here.

Respondent also asserts that the purpose of the Pricing Order is to "preserve hundreds of thousands of acres of open lands 'that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education.'" Resp. Br. 17 (quoting J.A. 13). Respondent did not make that argument in the Massachusetts Supreme Judicial Court, and neither that court's opinion nor the Pricing Order itself even suggests that the purpose of the Order is preservation of open lands.^{2/} In any event, the Commerce Clause prevents States from isolating themselves from the national economy, even if the

^{2/} Such an alleged purpose is even more tangential to milk price regulations than the need for "sanitary security" advanced (and rejected) in *Baldwin*. See 294 U.S. at 523-24.

State's purpose is to preserve open space rather than to favor its domestic industry. See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (State may not preserve open lands by barring importation of waste from other States).

Next, respondent asserts (Resp. Br. 17-18) that the purpose of the Pricing Order is not protectionist because its burden "falls extensively upon Massachusetts interests." *Id.* at 17. That argument confuses the purpose of the Order with its effects. And as an argument about effects, it is incorrect. Protectionist legislation generally burdens in-state buyers, who are prevented from purchasing cheaper imported goods. It does not follow that the effect of such laws, let alone their purpose, is not protectionist. See *Bacchus Imports*, 468 U.S. at 272 (court "erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by [in-state] consumers").^{3/}

Respondent further confuses purpose and effect by arguing (Br. 18-19) that the purpose of the Order is not protectionist because the Massachusetts Supreme Judicial Court found that petitioners had not demonstrated harmful effects on out-of-state interests. But state laws, such as the Massachusetts Pricing Order, that facially discriminate against interstate commerce are subject to what amounts to a *per se* rule of invalidity; plaintiffs are not required to present evidence that the laws have in fact caused measurable harm to identifiable out-of-state parties. See *Wyoming v.*

^{3/} Respondent also errs in suggesting (Resp. Br. 18) that, because petitioners happen to be located in Massachusetts, they "must look to the political process for protection." The Commerce Clause not only guarantees that "every farmer . . . will have free access to every market in the Nation," but also that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). Indeed, the successful plaintiffs in *Baldwin*, see 294 U.S. at 518, and *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 363 (1964), were milk processors located in the State that imposed the unconstitutional restrictions.

Oklahoma, 112 S. Ct. at 801; *Limbach*, 486 U.S. at 276. Moreover, respondent is quite wrong in asserting that "[a]ny local pricing advantage of out-of-state farmers is unaffected by the Order." Resp. Br. 18. The Pricing Order negates the out-of-state farmer's efficiency advantage by setting a minimum price on out-of-state milk higher than that voluntarily negotiated between buyers and sellers, and by providing a direct commercial advantage to in-state farmers. See Vermont Br. 14 (Massachusetts Pricing Order "injures already struggling farmers in export states like Vermont"); see also pp. 12-13 *infra* (describing effects of Order).

Next, respondent observes (Resp. Br. 19) that the Order creates an incentive for Massachusetts consumers to purchase lower-priced milk outside the State. Again, respondent's argument concerns effects rather than purposes, and is invalid. Tariffs and similar protectionist measures always create an incentive for in-state consumers to avoid the tariff. As *Baldwin* and other cases demonstrate, this feature of protectionist laws does not remotely show the absence of a protectionist purpose. It would be extraordinary if the openly protectionist purpose of the Massachusetts Pricing Order could be overcome by the suggestion that Boston consumers could make weekly milk runs across the New Hampshire border.

Finally, respondent contends (Resp. Br. 19-20) that the purpose of the Pricing Order is not economic protectionism because other States that are net exporters of milk have adopted similar laws. The short answer to this contention is that speculation about the legislative purposes of other States cannot supplant the clear statement of purpose in the Massachusetts Pricing Order itself. In any event, a Pricing Order designed to insulate a State's dairy farmers from competition for in-state sales would be no less protectionist if it were adopted by a State that is a net exporter of milk.

In short, respondent's efforts to overcome the openly protectionist purpose of the Pricing Order are unavailing. On that basis alone, the Order is unconstitutional. *Bacchus Imports*, 468 U.S. at 270.

3. Respondent's primary argument with respect to discriminatory effect is that the Pricing Order is lawful because it purportedly comprises two elements — a uniform assessment on sales of fluid milk for consumption in Massachusetts and a subsidy to Massachusetts dairy farmers — each of which assertedly would be lawful if adopted separately. See Resp. Br. 20-39. Respondent's argument rests on a simple fallacy. Actions that are lawful standing alone are not necessarily lawful in combination. It may be lawful for a person to drive, and also lawful for her to drink alcoholic beverages, but there is no argument that "[s]ince [drinking] and [driving] are lawful, taken separately, it would be surprising if the [law] somehow prohibited . . . these two measures" in combination. Resp. Br. 31.

The Court has expressly rejected this fallacy in analyzing state laws under the Commerce Clause. *Brown-Forman Distillers*, 476 U.S. at 579 ("the critical consideration is the overall effect of the [law] on both local and interstate activity"); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) ("[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963) ("a proper analysis must take the whole scheme of taxation into account" (quotation omitted)). Respondent ignores this settled principle by discussing individual features of the Pricing Order as if its other features did not exist.

If the Court were to accept respondent's fallacious reasoning, little would remain of the negative Commerce Clause. Under respondent's approach, the States could impose tariffs through a simple two-step process. First, the

State could enact a uniform tax on in-state and out-of-state goods sold within the State. Second, the State could provide for a rebate of the tax to in-state producers. As respondent recognizes (Resp. Br. 27 n.23), Commerce Clause analysis no longer turns on such formalisms. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).

a. Respondent contends (Resp. Br. 21-24) that the Pricing Order is a constitutionally permissible subsidy to domestic industry. That is incorrect. Although "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]," a State may not take action "in connection with the State's regulation of interstate commerce" that is "designed to give [the State's] residents an advantage in the marketplace." *Limbach*, 486 U.S. at 278 (emphasis omitted). The Massachusetts Pricing Order plainly is an unconstitutional regulation of interstate commerce rather than a permissible direct subsidy.

"A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole." *Walz v. Tax Comm'n*, 397 U.S. 664, 690 (1970) (Brennan, J., concurring); accord *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 35 (1989) (Scalia, J., dissenting); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 806-07 (1973) (Rehnquist, J., dissenting in part). Because subsidies are both expensive to taxpayers and highly visible, they are constrained by the state political process. Many voters who pay state income or sales taxes are likely to oppose "government hand outs" of general revenues to industries with which they have no connection. Even if a subsidy proposal does not arouse strong political opposition, it must compete with other public spending proposals. Consequently, state legislatures will appropriate general revenues — usually for a year at a time — only if there is a sufficient political consensus that the subsidy should take precedence over additional spending for public safety, education, and other important purposes. Given these

political constraints, direct subsidies are unlikely to be numerous or large enough to interfere seriously with interstate commerce. In addition, subsidies may be less injurious to interstate commerce than other forms of discriminatory state legislation because they lower, rather than raise, the cost of goods to the consumer.⁴⁷

As the Court noted in *Limbach*, "[t]o believe [that a subsidy] scheme is valid . . . is not to believe that [a regulatory scheme] must be valid as well." 486 U.S. at 278. The Massachusetts Pricing Order is far from the paradigm of a constitutional direct subsidy. Payments to Massachusetts farmers are not financed by resources exacted from the State's taxpayers as a whole, but instead reflect a state-mandated increase in the minimum price processors must pay for milk. The Order is framed as a regulation of the price of milk by a state administrative agency rather than an appropriation of public funds by the state legislature. The program of payments to Massachusetts farmers does not compete with other public spending proposals. The Order expressly provides that premiums "shall be distributed directly to Massachusetts producers," J.A. 37; the premiums are

⁴⁷ Commentators have recognized that subsidies may pose less of a threat to interstate commerce than other types of state action. See, e.g., Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 479 (1989) (subsidies "present visible preferences of one in-state constituency over another; thus, they are more likely than tariffs to engender resistance in the local legislative process"); Richard B. Collins, *Economic Union As A Constitutional Value*, 63 N.Y.U. L. Rev. 43, 102-03 (1988) ("political restraint works more reliably when states spend their citizens' tax money on subsidies than when they merely allocate advantages among classes of private persons through regulation"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1194-95 (1986) (suggesting several reasons why discriminatory state spending programs may be less objectionable under the Commerce Clause than regulations or taxes); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 544 (1981) (noting that subsidies, unlike price regulation, lower rather than raise prices to consumers).

segregated from the State's general revenues and distributed to farmers within days.^{5/} Thus, contrary to respondent's contention (Resp. Br. 31 n.27), the Massachusetts Pricing Order is a regulation of interstate commerce rather than a "grant of funds or property from a government . . . to a private person or company . . . as a simple gift or a payment of an amount in excess of the usual charges for a service." *Webster's Third New International Dictionary* 2279 (1968). Moreover, unlike a true subsidy, the Order raises rather than lowers the price of milk to consumers.^{6/}

b. Respondent also contends (Resp. Br. 25-29) that Massachusetts constitutionally could require processors to pay a uniform tax on all milk purchased for consumption in Massachusetts, including milk purchased from out-of-state farmers. Again, respondent proceeds as if the Pricing Order were a simple revenue-raising measure, ignoring the express provision of the Order that "[a]ll amounts received pursuant to this Order . . . shall be distributed directly to Massachusetts producers." J.A. 37. The Order as a whole — the exactions from processors and the distributions to farmers — violates the "cardinal rule of Commerce Clause jurisprudence" that "[n]o State . . . may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imports*, 468 U.S. at 268 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), quoting, in

^{5/} See J.A. 34 (processor payments due by the 25th day of the month); *id.* at 36 (distributions to farmers made on the 5th day of the following month).

^{6/} Respondent is far off the mark in suggesting (Resp. Br. 23, 37 n.32) that the "market participant doctrine" applies to this case. In *Limbach*, the Court flatly rejected the contention that any state program that has the purpose and effect of supporting state industry is "a form of state participation in the free market." 486 U.S. at 277. The state activity at issue here — regulating the price of fluid milk and distributing monies exacted from milk processors to in-state farmers — "cannot plausibly be analogized to the activity of a private purchaser." *Id.* at 278.

turn, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).^{7/}

Respondent emphasizes that the assessment, considered in isolation, is facially "evenhanded" because it applies to all milk purchased for consumption in Massachusetts. But "[t]he fact that [a law] has the advantage of appearing nondiscriminatory does not save it from invalidation." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 248 (1987) (quotation omitted); see also *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). In *Baldwin*, the State enacted a facially "evenhanded" requirement that processors pay a uniform minimum price for in-state and out-of-state milk. The Court nevertheless held that the law was invalid because it had the practical effect of discriminating against out-of-state farmers by preventing them from making additional sales at a lower price. The result would be no different if a State collected a premium from processors and then distributed it, on a pro rata basis, to both in-state and out-of-state farmers. It follows *a fortiori* that the Commerce Clause prevents Massachusetts from collecting a premium on all sales and distributing it solely to *in-state* farmers.

Henneford v. Silas Mason Co., 300 U.S. 577 (1937), does not support respondent's argument. *Henneford* involved a use tax on goods brought in from out-of-state that was identical to the sales tax applicable to goods sold within the State. In-state sellers obtained no competitive advantage from this tax scheme, and out-of-state sellers retained whatever

^{7/} See also Varat, 48 U. Chi. L. Rev. at 542 ("[S]tates are forbidden to tax out-of-state businesses more heavily than in-state businesses, and . . . the same impermissible result would be produced if resident and nonresident businesses were equally taxed but only resident businesses received cash subsidy rebates." (footnotes omitted)); Collins, 63 N.Y.U. L. Rev. at 98 n.332 ("An earmarked tax on locally subsidized goods paid by the industry would presumably be struck down, since the tax and subsidy scheme together would constitute a discriminatory tax").

price advantage they had as a result of greater efficiency. But in this case, as in *Baldwin*, the State has effectively eliminated all price differences below the State-established minimum price, including differences resulting from the greater efficiency of out-of-state farmers. In addition, payment of the Massachusetts premium derived from out-of-state sales to in-state farmers facially discriminates against out-of-state competitors, a factor not present in *Henneford*. *Henneford* thus might be of some help to respondent if Massachusetts levied a flat or percentage tax on all sales of fluid milk and used the revenue for general state purposes, such as road building and paying the salaries of state employees. But that is simply not this case.

An example illustrates the discriminatory effect of the Pricing Order. Suppose the federal minimum price for fluid milk is \$14/cwt, the federal blend price is \$12/cwt, and processors are paying a negotiated premium of \$.50/cwt in the absence of the Massachusetts Order.^{9/} Under the Federal Milk Marketing Order System, fluid milk processors will pay \$14.50/cwt (the \$14 federal minimum price plus the \$.50 negotiated premium) for both in-state and out-of-state milk, while both in-state and out-of-state farmers will receive \$12.50/cwt (the \$12 federal blend price plus the \$.50 negotiated premium). As a result of the Massachusetts Order, however, processors will be required to pay at least \$15/cwt (\$14/cwt plus a \$1 cwt Massachusetts premium), and in-state farmers will receive at least \$15 (the \$12 federal blend price

^{9/} Under the Federal Milk Marketing Order System, processors must pay a minimum price that is based on their use of the milk; dairy farmers receive a uniform "blend price" that is a weighted average of the minimum price paid by all processors. See MIF Br. 2-4. Sales to fluid milk processors in Massachusetts have commanded negotiated premiums (also known as "over-order premiums") in recent years. See Agric. Mktg. Serv., Dairy Div., U.S. Dep't of Agric., *Dairy Market News* (Dec. 1992-Nov. 1993).

plus a \$3 distribution under the Massachusetts Order).^{2/} Out-of-state farmers receive nothing under the Order. Consequently, they would have to *negotiate* a \$3/cwt premium to match the in-state farmer's minimum compensation of \$15/cwt; in that case, the price to the processor for out-of-state milk would be \$18/cwt, far above the \$15/cwt that the processor pays for in-state milk. If the out-of-state farmer instead meets the \$15/cwt price for in-state milk, he receives only \$12/cwt, far less than the \$15/cwt his in-state competitors receive, and less than the \$12.50 he would receive in the absence of the Massachusetts Order.^{10/}

Respondent argues that the State's authority to impose a uniform tax on sales of milk for consumption in Massachusetts rests on its "authority to raise [its] own revenues." Resp. Br. 27 (quotation omitted). But the stated purpose of the Order is not to raise revenue for the State, but to fix the price paid to Massachusetts farmers for milk. As the State itself explained in a prior pleading,

^{2/} The Massachusetts premium is one-third of the difference between \$15 and the federal blend price. See J.A. 35. Thus, if the federal blend price is \$12/cwt, the Massachusetts premium is \$1/cwt. A premium of \$1/cwt will result in payments to Massachusetts farmers of about \$3/cwt of milk production. That is so because the total volume of milk produced by Massachusetts dairy farmers is roughly one-third of the total volume of fluid milk sold by processors for consumption in Massachusetts. See J.A. 82. Consequently, the amount of money distributed to Massachusetts farmers under the Order per hundredweight of milk produced is roughly three times the amount collected from processors per hundredweight of fluid milk sold.

^{10/} Respondent's assertion (Br. 24) that payments to Massachusetts farmers will be used to "pay off farm debt and to invest" rather than to reduce prices is sheer speculation. Moreover, as respondent himself appears to recognize (*id.* at 24 n.20), farmers' private decisions, based on "market forces," about how to spend the Massachusetts premium are of no constitutional significance. As the above description demonstrates, out-of-state farmers are put at a large competitive disadvantage regardless of whether in-state farmers reduce their prices.

the premium payments required by the Pricing Order are not taxes because they do not provide for the general support of state government, or defray a public expense. They are instead payments to dairy farmers by milk dealers as part of the prices established pursuant to the pervasive regulation of the dairy industry in Massachusetts.¹¹

Finally, respondent contends (Resp. Br. 28-29) that there is no Commerce Clause violation because "the subsidized farming operations do not compete with the dealers' processing operations." *Id.* at 29 (emphasis omitted). That argument is frivolous. As *Baldwin* illustrates, a State cannot evade the constitutional prohibition of trade barriers simply by requiring distributors, rather than the producers, to pay the tariff. In any event, the Pricing Order discriminates not only against out-of-state farmers, but also against processors such as petitioners, who in the absence of the Order would take advantage of lower-priced out-of-state milk.

c. When respondent finally turns to the Pricing Order as a whole, he makes only two arguments (Resp. Br. 30-39) that "linkage" of the assessment and the payments to in-state farmers is constitutional. Both arguments are invalid.

Respondent argues (Resp. Br. 30-35) that the Pricing Order would be constitutional if the State deposited payments by milk processors into its general fund and paid farmers out of that fund, and that consequently it should make no difference that the State segregates the proceeds of the Pricing

¹¹ Memorandum of the Department of Food and Agriculture in Support of Motion for Summary Judgment in *Association of New England Milk Dealers v. Massachusetts Department of Food and Agriculture*, Sup. Ct. C.A. No. 92-1283-E (Suffolk Cty. Mass.), pp. 28-29. See also J.A. 23 ("The envisioned scheme is not a tax, and the monies would not be deposited into the general fund. The necessary program would raise the price a farmer receives for his milk and the money would be distributed, from a trust fund, to the farmer.").

Order in a special fund. See also MADF Br. 20 ("[P]etitioners would have no complaint if Massachusetts had enacted . . . a nondiscriminatory tax payable to the state treasury . . . and a subsidy to the Commonwealth's dairy farmers out of funds in the general treasury."). That argument is invalid because its premise is false: The Pricing Order would *not* be constitutional if the State deposited payments from processors in the State's general fund and then made payments out of the general fund to Massachusetts farmers. Such a scheme would have precisely the same protectionist purpose and effect as the Pricing Order under review, and therefore would violate the Commerce Clause.

Although the State could not save the Pricing Order simply by running its proceeds through the general fund, the State's decision to establish a separate fund raises *additional* constitutional issues. Once funds are deposited in the State's general fund, voters and state legislators may regard them as available for a variety of competing purposes. Indeed, respondent concedes that the purpose of the segregated fund is to eliminate "the political risk that the money would be used not only for the subsidy program, but also to defray the cost of providing *all* government services." Resp. Br. 31 (quotation omitted). The separate fund thus insulates the payments to farmers from the state political process.

Respondent also argues (Resp. Br. 35-39) that the Pricing Order is not an "extraterritorial pricing scheme" and therefore is not prohibited under *Baldwin*. In attempting to distinguish *Baldwin*, respondent relies solely on this court's decision in *Henneford*. As we have explained, see pp. 11-12 *supra*, *Henneford* is not applicable because the Pricing Order places an *unequal* burden on out-of-state milk, and requires "that producers . . . in other States surrender whatever competitive

advantages they may possess." *Brown-Forman Distillers*, 476 U.S. at 580.^{12/}

4. Finally, respondent is incorrect in arguing (Resp. Br. 40-42) that the Pricing Order is constitutional under the balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).^{13/} The local interest involved — protection of in-state dairy farmers from out-of-state competition — "is almost never a legitimate local purpose." *Maine v. Taylor*, 477 U.S. 131, 148 (1986). And the State's general interest in promoting its dairy industry could be promoted as effectively through a direct subsidy to in-state farmers from the State's general revenues. Contrary to respondent's contention, a direct subsidy would have less drastic effects on interstate commerce because it would not establish a minimum price for milk, would not divert proceeds from sales by out-of-state farmers to their in-state competitors, would lower rather than raise prices, and would be constrained by the political process.

^{12/} Respondent is plainly incorrect in asserting that the Massachusetts Pricing Order "resembles milk laws that this Court has upheld under the Commerce Clause on the ground that they affect only the essentially local activities of milk sales and production." Resp. Br. 39 (citations omitted). "The Court has . . . long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981) (collecting cases). The purpose and effect of the Massachusetts Order are to set a minimum price for both in-state and out-of-state milk, and to prevent Massachusetts dairy farmers from losing sales to out-of-state farmers. The Order thus operates as a direct regulation on interstate commerce.

^{13/} Respondent's assertion that the Massachusetts Pricing Order is subject to the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), is incorrect. As we have demonstrated, see pp. 10-14 *supra*, the Pricing Order, considered as a whole, is a regulation of interstate commerce rather than a revenue-raising measure. In any event, the Pricing Order flunks the *Complete Auto* test because it facially discriminates against interstate commerce.

If the Massachusetts Pricing Order is constitutional, other States can and will adopt similar laws to protect their dairy farmers.^{14/} And if state laws protecting the dairy industry are constitutional, then States can and will adopt laws insulating other industries from out-of-state competitors. For example, California could require computer dealers to make payments to California computer manufacturers based upon the dealers' purchases of computers from out-of-state manufacturers — including manufacturers located in Massachusetts. No doubt Massachusetts would respond in kind, and protectionist laws would proliferate. See *Hood*, 336 U.S. at 539 (describing "fantastic rivalries and dislocations and reprisals [that] would ensue" if States were permitted to "decree that industries located in that state shall have priority"). Respondent's argument is thus directly contrary to the fundamental principle that underlies the Commerce Clause, "that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin*, 294 U.S. at 523.

^{14/} At least three other States have already enacted laws similar to the Massachusetts Pricing Order. See *Marigold Foods, Inc. v. Redalen*, 834 F. Supp. 1163 (D. Minn. 1993); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Cumberland Farms, Inc. v. LaFaver*, 834 F. Supp. 27 (D. Me. 1993).

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

STEVEN J. ROSENBAUM
ROBERT A. LONG, JR.
JONATHAN R. GALST
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044
(202) 662-6000

MICHAEL L. ALTMAN*
MARGARET A. ROBBINS
RUBIN AND RUDMAN
50 Rowes Wharf
Boston, MA 02110
(617) 330-7000

Attorneys for Petitioners

** Counsel of Record*

JANUARY 5, 1994

IN THE

NOV 15 1993

OFFICE OF THE CLERK

Supreme Court of the United States**October Term, 1993****WEST LYNN CREAMERY, INC., and LECOMTE'S DAIRY, INC.,***Petitioners,**against***JONATHAN HEALY, Commissioner of Massachusetts Department of Food
and Agriculture,***Respondent.***WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT****Petition for Certiorari Filed July 15, 1993****Certiorari Granted October 4, 1993****BRIEF OF CUMBERLAND FARMS, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S
POSITION URGING REVERSAL****ALLAN AFROW**
777 Dedham Road
Canton, MA 02021
(617) 828-4900*Counsel of Record***SHELDON A. WEISS**
225 Millburn Avenue
Suite 102
Millburn, NJ 07041
(201) 376-0230*Of Counsel and on the Brief***BEST AVAILABLE COPY**

7122

Table of Contents.

	Page
Amicus Curiae's Interest in the Outcome of These Proceedings.....	2
The Recently-Enacted (1990's) State Class I "Premiums" and Federal Court Challenges Thereto ..	4
Summary of Argument	5
Point I. The Massachusetts Pricing Order, Which Requires All Milk Dealers to Pay a State-Imposed Class I "Premium" on all Fluid Milk Sold Within the State, Including Milk Produced on Out-of-State Dairy Farms, and Which Provides That the Monies Thus Exacted are to be Paid Over to In-State Producers Only, Represents an Impermissible Trade Barrier and Facially Violates the Commerce Clause, Within the Meaning of <i>Polar Ice Cream v. Andrews</i>	6
Point II. All Four of the Recently-Enacted State-Imposed Class "Premiums" (Including the Massachusetts Pricing Order) are Inconsistent with: (a) the Objectives Sought to be Attained by Congress in the 1985 Farm Bill; and (b) the Secretary of Agriculture's Very Recent (1991) Rejection of Proposals to Increase Class I Milk Prices Throughout the Federal Milk Marketing Order System, Including the Northeast.....	14

ii.	Page
A. The Interrelation of the Federal Milk Order and Dairy Price Support Programs	15
B. The Federal "Food Security Act" of 1985 and the 1990 "Nationwide" Federal Milk Marketing Order Hearings	17
C. Milk Price Fluctuations During 1989-1991..	19
Conclusion	21

Table of Contents of Appendix.

Complaint in Cumberland Farms, Inc., D-I-P v. Watson, United States District Court, D. Mass., # 92-12785 (WF) (Filed November 20,, 1992)	1a
Opinion and Judgment in Cumberland Farms, Inc. v. LaFaver, et al., No. 92-70-P-H (D. Maine August 3, 1993)	22a
New England Federal Milk Marketing Order #1 Statistics (Annual 1977-1992 and Monthly 1989-1991)	33a
Excerpts from House Report 99-271, Part 1, 99 Cong.1st Sess., accompanying H.R. 2100 (September 13, 1985)	36a

iii.	Page
------	------

TABLE OF AUTHORITIES.

CASES:

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). <i>passim</i>	
Cumberland Farms, Inc. v. LaFaver, et al., U.S.D.C. Me., August 3, 1993 (No. 93-2066).....	4, 13
Farmland Dairies v. McGuire, 7898 F. Supp. 1243 (S.D.N.Y. 1992)	5
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).....	12
Lehigh Valley Cooperative v. United States, 370 U.S. 76 (1962).....	1, 7
Marigold Foods, Inc., et al. v. Redalen, 809 F. Supp. 714 (D. Minn. 1992) (<i>Marigold I</i>) and ____ F. Supp. ____ (D. Minn. 1993) (<i>Marigold II</i>)	5
Polar Ice Cream v. Andrews, 375 U.S. 361 (1964). . <i>passim</i>	
Zuber v. Allen, 396 U.S. 168 (1969)	7

Federal Statutes:

7 U.S.C., Sec. 608c(5).....	18
Sec. 1446 et seq.	16
Sec. 1446(d)(1)(2)(3)	18

P.L. 99-198, 99 Stat. 1372 ("Food Security Act of 1985")	15
----------------------------------------------------------------	----

Administrative Regulations and Decisions:

7 C.F.R., Sec. 1001.2	2
7 C.F.R., Sec. 1002.2	3
56 Fed. Reg. 58972 (November 22, 1991)	18
58 Fed. Reg. 12634 (March 5, 1993).....	18

Supreme Court Rules:

Rule 37.1	6
Rule 37.2	2

Other:

H. Report 99-271, Part 1, 99th Cong., 1st Sess. (1985)	15
-----------------------------------------------------------------	----

No. 93-141

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,

*Petitioners,**against*

JONATHAN HEALY, Commissioner of Massachusetts
Department of Food and Agriculture,

Respondent.

WRIT OF CERTIORARI TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

Petition for Certiorari Filed July 15, 1993

Certiorari Granted October 4, 1993

Brief for *Amicus Curiae* Cumberland Farms, Inc.

Amicus curiae Cumberland Farms, Inc. (hereinafter
sometimes "Cumberland" or "CFI") submits the following

brief, pursuant to *Supreme Court Rule 37.2* (the written consent of the parties is being filed contemporaneously), in support of the position being advanced by petitioners *West Lynn Creamery, Inc.* and *LeComte's Dairy, Inc.*

Amicus Curiae's Interest in the Outcome of These Proceedings

Amicus is a fluid milk dealer, licensed by respondent Commissioner to operate as such in the Commonwealth of Massachusetts. It operates a large, federally-regulated fluid milk plant in Canton, Massachusetts, a suburb of Boston, from which plant it distributes fluid milk products throughout New England. Most (about 80%) of the raw milk processed in that plant is produced on out-of-state dairy farms. In that respect, *amicus's* interest in this proceeding precisely parallels that of petitioners (App. 12a).^{*} In addition, Cumberland operates a federally-regulated fluid milk plant in East Greenbush, New York, from which it distributes fluid milk products to New York State and to Western Massachusetts, primarily through its own dairy convenience stores. The New York processing plant is supplied by New York and Vermont dairy farmers. *None* of the raw milk processed in that plant is produced on Massachusetts dairy farms.¹

^{*}App. in quotes refers to appendix attached to this brief.

¹CFI's Massachusetts plant is regulated by the "New England Federal Milk Marketing Order #1" (the "New England Federal Order"), which includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire (7 C.F.R., Section 1001.2). Its New York plant is regulated by the "New York-New Jersey Federal Milk Marketing Order #2" (the "New York-New Jersey Federal Order"), which includes most of Eastern and Central New York and all of Northern and Central New Jersey (Footnote continued on next page.)

CFI's federally-regulated New York processing plant thus affords the ultimate example of the adverse protectionist and burdensome effect of the Massachusetts regulation upon interstate commerce, to wit: very substantial payments are exacted from *amicus* by respondent Commissioner (under pain of imminent license revocation) to be distributed solely to Massachusetts dairy farmers, notwithstanding that not one drop of milk processed at that plant is produced on Massachusetts farms.

Similarly, although Cumberland's Canton, Massachusetts plant acquires *none* of its producer milk from Maine dairy farmers, that plant regularly supplies fluid milk products to CFI's 20-odd dairy convenience stores in Maine. Because the State of Maine also has enacted a state Class I "premium" scheme which, in every respect material to the Commerce Clause issue, is indistinguishable from the Massachusetts Pricing Order, *amicus* has an additional pecuniary interest in the outcome of these proceedings.

Indeed, *amicus* is a party plaintiff in two pending federal cases which present the same facial Commerce Clause challenge to these recently-enacted state-imposed milk "premiums": (a) a proceeding which parallels the case at bar, *Cumberland Farms v. Watson*, No. 92-12785 (WF), pending in the District Court for the District of Massachusetts;² and (b) an appeal to the First Circuit Court of Appeals from the lower court's judgment which had sustained Maine's regula-

(Footnote continued.)

(7 C.F.R., Section 1002.2). Thus, with respect to both plant operations, Cumberland's payment obligations for the raw milk it purchases, and the minimum prices received by producers supplying those milk processing plants, are determined by the provisions of said Federal Orders #1 and #2, respectively. (App. 5a).

²Cumberland's complaint (App. 1a-21a) was filed on November 12, 1992. Its summary judgment motion was filed in July 1993, and is pending unheard as this *amicus* brief is being prepared.

tion, on cross-motion for summary judgment. *Cumberland Farms, Inc. v. LaFaver, et al.*, No. 93-2066.³

***The Recently-Enacted (1990's) State Class I
"Premiums" and Federal Court Challenges Thereto***

Maine and Massachusetts are two of the four states which have enacted state-imposed federal milk "premiums" within the last two years. The others are New York (in 1991) and Minnesota (in 1992 and 1993). All these schemes contain each of the following features: (a) a state-mandated "premium" minimum price for packaged fluid milk sales (Class "I" sales) within the state, which are substantially higher than the relevant federal order price; (2) application of that same rate of impost upon milk produced on out-of-state dairy farms, for the purpose and with the necessary effect of removing any incentive for fluid milk processors ("handlers") to obtain out-of-state milk supplies; and (3) distribution of the monies thus exacted from handlers of in-state and out-of-state milk alike to in-state dairy farmers only.

All four enactments have been challenged in the federal courts, and upon essentially the same grounds—that although the state regulations purport to apply even-handedly to in-state and out-of-state milk, the very application of the local assessment to out-of-state milk represents economic protectionism and therefore is proscribed by the Commerce Clause, as a matter of law. The New York and Minnesota regulations already have been held to be facially invalid as applied to out-of-state milk, on the basis of *Baldwin v.*

³The federal district court's opinion in that case was rendered on August 3, 1993 (App. 22a-32a). Cumberland's brief as appellant was filed in the First Circuit on or about November 4, 1993.

G.A.F. Seelig, Inc., 294 U.S. 511 (1935) and other controlling precedents. *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992), *Marigold Foods, Inc. et al. v. Redalen*, 809 F. Supp. 714 (D. Minn. 1992) (Marigold I) and *Marigold Foods, et al. v. Redalen* (D. Minn. decided October 20, 1993) (Marigold II).

SUMMARY OF ARGUMENT

Amicus contends that the Massachusetts and Maine regulatory schemes should suffer the same fate and for essentially the same reasons—that they also facially offend very well-established Commerce Clause principles, in at least two respects. First, by requiring *amicus* (and others similarly situated) to pay the same state-imposed Class I "premium" with respect to out-of-state milk as that imposed upon locally-produced milk, the regulations in effect exact a prohibited "customs duty" equal to the price differential between the state-enhanced price and lower-priced (but federally-regulated) out-of-state milk. The controlling precedents are *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, and its progeny. Secondly, by distributing the proceeds of that exaction to in-state dairy farmers only, the regulations reserve to local producers the entire benefit of this state-augmented Class I price, thereby clearly offending the principles laid down in *Polar Ice Cream v. Andrews*, 375 U.S. 361 (1964).

Having been afforded the opportunity to review the draft of petitioners' brief on the merits, and being familiar with the arguments to be advanced on behalf of *amicus* Milk

Industry Foundation ("MIF"),⁴ in accordance with *Rule 37.1* our brief will attempt to bring relevant matter to this Court's attention which we have reason to believe will not be dealt with at length by petitioners or by the other *amicus*. Thus, our Argument will be confined to the following Points: (a) the impact of *Polar Ice Cream v. Andrews, supra*, upon resolution of the Commerce Clause issue; and (b) a description of the Congressional and Executive Branch actions with respect to the dairy price support program and federal milk order pricing during the last decade, and the extent to which these recently-enacted state "premiums" conflict with the objectives sought to be attained thereby.

ARGUMENT

POINT I

THE MASSACHUSETTS PRICING ORDER, WHICH REQUIRES ALL MILK DEALERS TO PAY A STATE-IMPOSED CLASS I "PREMIUM" ON ALL FLUID MILK SOLD WITHIN THE STATE, INCLUDING MILK PRODUCED ON OUT-OF-STATE DAIRY FARMS, AND WHICH PROVIDES THAT THE MONIES THUS EXACTED ARE TO BE PAID OVER TO IN-STATE PRODUCERS ONLY, REPRESENTS AN IMPERMISSIBLE TRADE BARRIER AND FACIALLY VIOLATES THE COMMERCE CLAUSE, WITHIN THE MEANING OF *POLAR ICE CREAM V. ANDREWS*

Preliminarily, we believe that the following description of the economic background to and the operation of the

⁴MIF is the nationwide milk dealers' trade association. We have been informed that the attorneys who will be filing its *amicus curiae* brief also represented the successful plaintiffs in *Marigold I* and *Marigold II*.

federal milk marketing order program will assist the Court in focusing upon the issues discussed herein. (These matters have been described in considerable detail in some of this Court's prior decisions).⁵

The two distinctive and essential economic phenomena peculiar to the milk industry which gave rise to governmental price regulation in the wake of the Great Depression of the 1930's are: (a) a basic two-price structure that permits a higher return for the same product depending upon its ultimate use; and (b) the cyclical characteristic of raw milk production which results in the maintenance throughout the marketing season of substantial raw milk production in excess of fluid demand. See *Zuber v. Allen*, 396 U.S. 168, 172 (1969).

Federal milk marketing orders maintain uniform prices to handlers for milk utilized in the same use class and, at the same time, eliminate any incentive for dairy farmers to engage in destructive internecine competition for the higher-priced fluid milk market by "marketwide pooling," to wit: Milk packaged for consumption in fluid form ("Class I" milk) commands the highest price in the marketplace. All dairy farmers supplying handlers in a federally-regulated market share proportionately in the benefit of that higher-priced Class I use, and conversely, share proportionately in the burden of carrying the market's surplus (or

⁵See e.g., *Zuber v. Allen*, 396 U.S. 168, 177-178 (1969); *Lehigh Valley Cooperative v. United States*, 370 U.S. 76, 78-81 (1962) and *Polar Ice Cream v. Andrews, supra* (375 U.S. at 367, Note 4).

Class III) milk⁶, because all producers supplying the market are paid the same "blend" price which, subject to certain differentials not here relevant, reflects the marketwide weighted average "use" values of raw milk purchased by all the handlers regulated by the Order. But all handlers pay for their raw milk in accordance with their own "use value." This is accomplished by the "producer settlement fund," administered by the federal milk market administrator, pursuant to which each handler, in addition to paying the "blend" price directly to farmers, either makes a monthly payment into, or draws a payment from, that fund depending upon whether its particular "use value" is more than or less than the marketwide average.

Thus, federally-regulated handlers such as *amicus*, i.e., those businesses which primarily are involved in the processing and packaging of raw milk for consumption in fluid form, make *two* separate payments for their raw milk: (i) they pay directly to their dairy farmers at least the monthly "blend" price as determined by the federal milk marketing administrator; and (ii) they make a separate payment into the "producer settlement fund" of the difference between their own "use value" and the marketwide average of all handlers' use values. Thus, it is the act of disposing of (selling) the finished product as Class I milk (rather than the purchase of the raw milk itself) which solely triggers, and determines the amount of, the second of the two payment obligations.

⁶Class III milk is used to manufacture "hard" dairy products such as butter, powdered milk and hard cheeses. Under the orders, there also is a Class II category, which includes most "soft" products, such as cottage cheese, sour cream, yogurt, etc. For purposes of this case, however, Class II and Class III milk shall be referred to together as "surplus" milk.

All four of the recently-enacted state Class I "premiums," including the Maine and Massachusetts regulations, would exact from handlers a third monthly payment, solely as a consequence of in-state sales of fluid milk and irrespective of the state of origin of the producer milk—a payment which is the functional equivalent of a "customs duty" equal to the difference between the augmented State minimum price and the federal order Class I price.⁷ And, because the revenues generated by those state-imposed premiums are funnelled (by state regulatory officials) solely to in-state producers, these state-mandated "premiums": (1) are utterly inconsistent with the very purpose of marketwide pooling under the federal orders—an equitable sharing of benefits and burdens of fluid and surplus milk utilization among *all* producers supplying the market; and (2) more to the present point, are utterly inconsistent with the teaching of *Polar Ice Cream v. Andrews*, *supra*.

In that case, this Court invalidated Florida's attempt to reserve the benefits of the lucrative Pensacola area Class I market to its local producers, before permitting any out-of-state milk to be utilized for Class I purposes. Justice White, speaking for an unanimous Court, held that that case was controlled by *Baldwin* and its progeny, stating (375 U.S. at 375, 377):

"The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme

⁷Although *amicus* contends that in so doing, these state enactments clearly violate the principles of *Baldwin v. Seelig*, in that respect we shall rely upon the arguments presented in the briefs to be submitted on behalf of petitioners and on behalf of *amicus* MIF.

which reserves to its local producers a substantial share of the Florida [Class I] milk market.” (375)

* * *

“The exclusion of foreign milk from a major portion of the Florida market cannot be justified as an economic measure to protect the welfare of Florida dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. This much *Baldwin* and *Dean* made clear . . . Florida has no power ‘to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones,’ 294 US 521, 79 L ed 1037; the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, *insulate the Florida milk industry from competition from other States.*” (emphasis added). (377).

The Massachusetts regulation, in addition to eliminating any economic incentive for handlers to increase their purchase of out-of-state raw milk to fulfill their Class I needs, also mandates that the entire benefit of the state Class I “premium” will be distributed solely to in-state dairy farmers, even if 100% of the Class I milk sold in the Commonwealth were to be produced on out-of-state farms!! Putting it in other words, the Commissioner’s Pricing Order adds a *Polar Ice Cream* Commerce Clause insult to the *Baldwin v. Seelig* injury. In either event, it should not have passed Constitutional muster in that State’s court of last resort.

Obviously, the Commerce Clause denies to Massachusetts the power to thus appropriate unto its residents alone revenues which rightfully should have belonged, if at all, to out-of-state producers. As stated in *Polar Ice Cream, supra* (375 U.S. at 379):

“The power which we deny to Florida is reserved to Congress under the Commerce Clause, and we are offered nothing indicating either congressional consent to, or acquiescence in, a regulatory scheme such as Florida has employed. On the contrary, under the present Act authorizing federal marketing orders in the milk industry, such an order may not ‘prohibit or in any manner limit, in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States.’ This provision, as the Court explained in *Lehigh Valley Coop. v. United States*, 370 US 76 . . . was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. *We seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the States.*” (emphasis added).

In *Polar*, Justice White also referred to the then “recurring question of the validity of a State’s attempt to regulate the supply and distribution of milk and milk products.” 375 U.S. at 362. In the nearly thirty years which have elapsed since *Polar Ice Cream* was decided, we are not aware (until recently) of any state that has attempted to protect its local dairy farmers from the competitive effects of out-of-state commerce in milk. (Except for the “reciprocity” statutes and even those relatively innocuous measures were struck

down as violative of the Commerce Clause in *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976)). Meanwhile, the federal milk order program has enjoyed phenomenal success and acceptance by the milk industry, to the point that by the 1980's the overwhelming majority (about 80%) of milk marketed as Class I milk in the United States was processed and sold by federally-regulated handlers.

It has only been within the last two years that three State Legislatures (New York, Maine and Minnesota) and one State regulatory official (Massachusetts) have attempted to bolster the income of their local dairy farmers by mandating state-imposed Class I "premiums." As stated above, all four state regulatory schemes include: (1) the establishment (by legislative or administrative fiat) of a state-mandated "target" Class I price with respect to all in-state sales of packaged fluid milk; (2) the exaction (by State officials) of a mandatory assessment upon wholesalers (processors or distributors) of fluid milk within the State, equal to the approximate difference between the "target" price and some lower-priced (but federally established) reference point; (3) application of that uniformly-imposed monetary charge to milk produced on both in-state and out-of-state dairy farms; and (4) distribution of the monies thus exacted pro rata to in-state dairy farmers only, to the complete exclusion of the out-of-state farmers which produced the raw milk involved.

And, as we also have seen: (a) federal district court judges in New York and Minnesota already have held those two state "premiums" to facially offend the Commerce Clause; and (b) *amicus* CFI's federal court challenges to the Massachusetts and Maine "premiums" are pending in the District Court and the First Circuit Court of Appeals, respectively. In that regard, we respectfully refer this Court to

the striking similarities between: the *ratio decidendi* of the SJC in this case and the federal district court's opinion in *Cumberland Farms v. LaFaver* (App. 22a-32a).

Amicus recognizes that the validity *vel non* of the Maine enactment is not presently *sub judice* here. (Nor do we presently know if the State of Maine intends to participate as an *amicus* in this proceeding). Accordingly, we conclude this portion of our presentation by merely noting that although densely-populated Massachusetts is a decided "import" state whereas Maine is an "export" state, resolution of the Commerce Clause issue cannot depend upon whether a particular state is "deficit" or "surplus" insofar as milk production vs. consumption is concerned. Otherwise, blatant economic protectionism would be prohibited in densely-populated states and sanctioned in thinly-populated states—an absurd result. In that regard, we also note that: (a) Minnesota's per capita raw milk production probably is among the highest, if not *the* highest in the Country; and (b) New York also is an "export" state now and probably also was in the 1930's when *Baldwin v. Seelig* was decided. Accordingly, the fact that Maine also is an "export" state should in no way serve to insulate its enactment from its Commerce Clause infirmities.

POINT II

ALL FOUR OF THE RECENTLY-ENACTED STATE-IMPOSED CLASS I "PREMIUMS" (INCLUDING THE MASSACHUSETTS PRICING ORDER) ARE INCONSISTENT WITH: (A) THE OBJECTIVES SOUGHT TO BE ATTAINED BY CONGRESS IN THE 1985 FARM BILL; AND (B) THE SECRETARY OF AGRICULTURE'S VERY RECENT (1991) REJECTION OF PROPOSALS TO INCREASE CLASS I MILK PRICES THROUGHOUT THE FEDERAL MILK MARKETING ORDER SYSTEM, INCLUDING THE NORTHEAST

[We recognize that consideration of the matters discussed herein is not, strictly speaking, necessary to a proper resolution of the Commerce Clause issue. After all, *Baldwin v. Seelig* was decided long before any of the federal programs discussed herein were in place, and while the Country's dairy farmers were still suffering the throes of the Great Depression of the 1930's. Nonetheless, we believe that it is important to emphasize that: (a) to a considerable extent, these recently-enacted state "premiums" run counter to recent federal policies dealing with the same subject matter (the appropriate level of minimum milk prices and its effect upon the total quantity of milk produced on our Nation's dairy farms); and (b) dairy farmers in the Northeast are far from an "embattled" species].⁸

⁸Quoting from the opinion in *Cumberland Farms v. LaFaver* (App. 22a).

A. The Interrelation of the Federal Milk Order and Dairy Price Support Programs⁹

The minimum Class I milk prices established by the Secretary throughout the federal order system are comprised essentially of two component parts: (a) the value, at any given time, of producer milk used to manufacture surplus dairy products, such as butter, non-fat powdered milk and hard cheese (the "basic formula" price); and (b) a specific "Class I" differential (the particular market's "distance" differential). The former is derived from the "Minnesota-Wisconsin Price Series" (M-W), a monthly statistical sampling made by the USDA of actual prices paid to dairy farmers in those two states by plants processing Grade B (manufacturing grade) milk, for use in the manufacture of butter, cheese and non-fat powdered milk. Because those manufactured "dry" dairy products can be transported over long distances at a relatively small cost, the value of Grade A milk when used to produce such products, and ergo the surplus (or Class III) price that handlers pay for such milk, is essentially the same as the M-W price throughout the entire federal order system.

Moreover, for many decades the federal government (or more accurately, federal taxpayers) has been supporting that "basic formula" price by means of a separately-enacted Congressional program—the dairy price support program—pursuant to which the Government, through the Commodity

⁹The matters referred to herein are described in considerably greater detail in the House Report accompanying H.R. 2100, the bill which ultimately became the "Food Security Act of 1985." P.L. 99-198, 99 Stat. 1372. *H. Rpt.* 99-271, Part 1, 99th Cong., 1st Sess., pp. 1 to 25 (1985), relevant portions of which appear at App. 36a *et seq.*

Credit Corporation ("CCC"), agrees to purchase all the butter, non-fat dry milk and American cheese on the market at pre-announced "floor" prices. See generally, the *Agricultural Act of 1949*, as amended, the relevant portions of which are now contained in 7 U.S.C., Section 1446, et seq.

On the other hand, the Class I or "distance" differentials are regional in scope. They vary from each other generally in direct proportion to the distance from the Center of the Upper Midwest (Eau Claire, Wisconsin, to be precise) to the population center of the particular federal order. That inter-market alignment is designed (at least in part) to discourage uneconomic movements of bulk producer milk among the orders, and thus reflects (again, at least in part) the cost of transporting fluid milk from the Upper Midwest to the particular federal market order involved.¹⁰

The "basic formula" or M-W price is by far the larger of the two components of the minimum Class I pricing, even in the Northeast. To illustrate, between 1985 and 1990, the annual average "M-W" price (which fluctuates seasonally) has ranged between \$11.30 and \$12.37/cwt, whereas the Class I "differential" established for the New England

¹⁰Uneconomic intra-market movement of fluid milk is discouraged by means of "location" differentials within a particular federal order. For instance, within Federal Order #1, Class I prices are "zoned," depending upon the location of the plant to which the producer milk is delivered. Milk delivered to metropolitan Boston ("City") plants commands the highest price, and the Class I prices decrease in proportion to the plant's distance therefrom and at rates which generally reflect the cost of transporting fluid milk (whether in bulk or consumer-type packages). That cost now is and for some time has been recognized to be about \$.34/cwt per 100 miles. See e.g., *H. Rpt.* p. 24 at App. 44a. And, the Class I price at the 201-210 mile or "21st Zone" is \$.72/cwt less than the nearest Boston "City" Zone Class I price of \$3.24/cwt.

Federal Order at the Boston ["city"] zone) has remained at \$3.24/cwt.

B. The Federal "Food Security Act" of 1985 and the 1990 "Nationwide" Federal Milk Marketing Order Hearings

The federal milk marketing order program has enjoyed phenomenal success, and widespread acceptance in the industry (both producer and processor organizations) in accomplishing its twin goals of market stability ("orderly marketing") and reasonable returns for our Nation's milk producers. Indeed, by the late 1980's (if not earlier), 80% of Grade A (fluid grade) milk produced in the United States was regulated by federal milk marketing orders. *H. Rpt.*, supra note 8, p. 22 (App. 43a). On the other hand, during the 1980's, the dairy price support program was generally believed to have engendered over-production (at a tremendous cost to the taxpayers) because the support levels were too high.¹¹

The Congressional response was contained in the 1985 Food Security Act, *P.L. 99-198, 99 Stat. 1372 et seq.*, two features of which were: (a) the "dairy termination" or "whole herd buyout" program, under which dairy farmers throughout the Country were provided very significant cash incentives if they were to agree to cease dairying for five years (and dispose of their herds for purposes other than for milk production); and (b) restructuring of the price support program so as to provide for automatic reductions in support prices whenever CCC purchases reached certain levels. See

¹¹For a more detailed description of the foregoing matters, including the cause and effect relationship between the price support program and over-production of milk throughout the Country during the 1970s and 1980s, see *H. Rpt.* 19-22 (App. 39a-42a).

7 U.S.C., Section 1446 (d)(1)(2) and (3). Both programs obviously were designed to reduce the absolute number of dairy farmers in the Country and thus the nationwide milk supply and to reduce the budgetary outlays for the dairy price support program. See *H. Rpt.* at 14 and 19; App. 38a and 39a.

At the same time, Congress evidenced its continued support of the federal milk order program by, among other things, mandating increases in the Class I differentials throughout most of the entire federal order system, thus recognizing that the size of those "distance-related" prices (which had not been changed for decades) had not kept pace with increases in transportation costs. Those "distance" differentials were incorporated into the Act itself. See 7 U.S.C., Section 608c(5) (*H. Rpt.* 22-24; App. 43-44).¹²

Some producer interest groups apparently were not pleased with the foregoing, especially in Wisconsin and Minnesota (which two states produced virtually all of the Grade B milk, and a majority of the Grade A milk used for manufacturing purposes in the federal order system). Ultimately, in 1990, those groups successfully petitioned the United States Secretary of Agriculture to hold an unprecedented (and extremely extensive) series of "nationwide" federal milk marketing order hearings. The outcome of those proceedings are not relevant to this case save in one respect—the Secretary refused to accept all proposals, in-

¹²As the House Report recognized, p. 24 (App. 44a), by 1985 it was costing about 3.4 cents/cwt per 10 miles to move milk, whereas the then existing Class I differentials had remained at about 1.5 cents/cwt, despite "dramatic increases in transportation costs in the interim." As noted earlier, the 1985 Congressionally-mandated Class I differential applicable to the Boston Zone under Order #1, was (and still is) \$3.24/cwt.

cluding the one advanced by Agri-Mark—by far the largest and politically most active producer cooperative in New England—to increase Class I differentials above the price levels mandated by the 1985 Act.¹³

C. Milk Price Fluctuations During 1989-1991

Having thus been unsuccessful in persuading the Federal Government (both the Legislative and Executive branches) to enact the kind of price-enhancement measures they sought, some producer groups aimed their lobbying efforts at state governments. They may have been aided somewhat in their lobbying efforts by the fact that although milk was in rather tight supply and milk prices were thus at record high levels during 1989-1990, milk prices declined rather dramatically during the Fall of 1990. But these fluctuations in nationwide milk prices: (a) were brought about by the combined effects of the 1985 federal policies described above, together with the adverse effects of rather unusual weather in several regional milksheds; and (b) were relatively brief in duration—by the Spring of 1991, the M-W price had returned to 1988-1989 levels).¹⁴

¹³The extent and all-encompassing scope of those hearings (U.S.D.A. Docket Nos. AO-14-A64, etc.) is readily apparent from the Secretary's Recommended and Final Decisions as printed in 56 Fed. Reg. 58972 (11/22/91) and 58 Fed. Reg. 12634 (3/5/93) respectively. Agri-Mark's proposal (A-17) is described at 56 Fed. Reg. 58975-6 and 58 Fed. Reg. 12638-9. The Secretary's determination—"that the present Class I differential should remain in place"—can be found at 56 Fed. Reg. 58984 and 58 Fed. Reg. 12646.

¹⁴The data referred to herein are based upon the "Milk Market Statistics" as published annually by the New England Order #1 market (Footnote continued on next page.)

Although these producer price fluctuations occurred throughout the Nation, dairy farmers were successful in their lobbying efforts in but four states. It is ironic that Maine and Massachusetts should have been two of those states, because dairy farmers there already were enjoying milk prices that were among the highest in the Country, due in part to relatively high Class I prices and Class I utilization of producer milk in New England, and the existence throughout most of the market of substantial negotiated "over-order" Class I premiums.

To summarize all of the foregoing, although dairy farmers throughout the United States enjoyed some "ups" and suffered some "downs" due to milk price fluctuations between mid-1989 and mid-1991, (during the course of which they had enjoyed some record high milk prices): (a) neither Congress nor the Secretary took any actions to increase milk prices anywhere; and (b) to the extent these state-imposed Class I "premiums" encourage local dairy farmers to in-

(Footnote continued.)

Administrator, some of which data are summarized at App. 33a to 35a. More particularly, during 1989: (a) the M-W price fluctuated from a low of \$10.98/cwt in March to a high of \$14.93 in December—a price which was roughly \$2.50/cwt higher than its highest point since 1985; and (b) the M-W price *averaged* \$12.37 during the year, which was the highest *annual* average since 1984. Moreover, the most dramatic increases occurred between August and December 1989, when the M-W price jumped from \$12.37 to \$14.93. Relatively high milk prices continued throughout most of 1990, until October of that year when the M-W price dropped to \$10.48. However, by August 1991, supply/demand equilibrium returned, and the M-W price rose to \$11.50 that month and reached about \$12.50 during October/November 1991. That was about where it had been throughout the several years preceding the 1985 Food Security Act. And, in 1992 the M-W price averaged \$11.88/cwt—substantially higher than *all* annual averages 1985-1988! (App. 34a).

crease milk production, they run counter to the objectives sought to be attained by the federal Congressional and Executive actions referred to above.

CONCLUSION

For all the foregoing reasons, *amicus* Cumberland Farms, Inc. supports petitioners in urging this Court to reverse the determination below and hold that the Massachusetts Pricing Order is unenforceable against petitioners, and against all milk dealers operating in the Commonwealth of Massachusetts.

Respectfully submitted,

CUMBERLAND FARMS, INC.

By their Attorneys,

SHELDON A. WEISS
225 Millburn Avenue
Suite 102
Millburn, NJ 07041
Of Counsel & on the Brief

ALLAN AFROW, ESQ.
777 Dedham Road
Canton, MA 02021
Counsel of Record

Dated: November 15, 1993

**APPENDIX TO BRIEF OF *AMICUS CURIAE*
CUMBERLAND FARMS, INC.**

**Complaint in Cumberland Farms, Inc., D-I-P v.
Watson, United States District Court.**

Filed: U.S. District Court, District of Massachusetts,
Clerk's Office, November 20, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CUMBERLAND FARMS, INC.,
Debtor-in-Possession,

Plaintiff,

against

GREGORY WATSON, Individually and as COMMISSIONER,
Massachusetts Department of Food and Agriculture,

Defendant.

Civil Action No. 92-12785 WF COMPLAINT

Plaintiff, Cumberland Farms, Inc., Debtor-In-Possession
in Chapter 11 bankruptcy proceedings pending before the
United States Bankruptcy Court for the District of Massa-
chusetts (Case No. 92-41305), complaining of defendant,
says:

JURISDICTION AND VENUE

1. This action is filed to obtain, among other things:

(a) a declaratory judgment that the 1992 "Pricing Order" issued by defendant as Commissioner of the Massachusetts Department of Food and Agriculture (hereinafter "Commissioner") facially and as applied to plaintiff (i) violates the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3); (ii) deprives plaintiff of rights guaranteed pursuant to 42 U.S.C., Sec. 1983; (iii) is inconsistent with and therefore pre-empted by paramount Federal law, including Sec. 602 of the Agricultural Marketing Agreements Act of 1937 (7 U.S.C., Sec. 602) and therefore unenforceable pursuant to the Supremacy Clause of the United States Constitution (Art. V); and (iv) deprives plaintiff of due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution;

(b) appropriate preliminary and permanent injunctive relief enjoining defendant from enforcing said Pricing Order against plaintiff either directly or indirectly (*i.e.*, by seeking to impose any administrative or judicial sanction against plaintiff arising out of plaintiff's noncompliance therewith);

(c) damages, including a refund of all monies heretofore paid by plaintiff pursuant to said Pricing Order, together with interest thereon;

(d) reasonable attorney's fees, as provided for, *inter alia*, by 42 U.S.C., Sec. 1988; and

(e) such other relief as may be appropriate.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C., Sections 1331, 1343(3), 2201 and 2202; and 42 U.S.C., Sec. 1983; and the doctrine of pendent jurisdiction.

3. Venue is proper in this District because plaintiff's claims arose here.

PARTIES

4. Plaintiff is a milk dealer licensed by defendant Commissioner to sell milk in the Commonwealth of Massachusetts. Plaintiff operates fluid milk processing plants both within the Commonwealth (at Canton, Massachusetts) and in the State of New York (at East Greenbush). The milk processed in those two plants is distributed both within the Commonwealth and throughout all of New England and the State of New York. The raw milk which plaintiff processes in said plants is produced on dairy farms throughout New England and in New York State. (As more particularly appears below, very few of those dairy farms are located in Massachusetts). Throughout its entire operation, from raw milk procurement to and including distribution of the finished product, plaintiff is engaged in interstate commerce.

5. Defendant Gregory Watson ("Commissioner") is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which *inter alia*, is charged with the regulation of the milk industry in Massachusetts under the provisions of Chapter 94A. Said defendant, acting in his official capacity, promulgated the 1992 Pricing Order which is the subject of this Complaint.

**BACKGROUND—THE INTERSTATE NATURE OF
COMMERCE IN, AND ECONOMIC FEDERAL
REGULATION OF, FLUID MILK IN THE
NORTHEAST, INCLUDING THE NEW
ENGLAND STATES**

6. The dairy industry in the Northeastern United States, including New England, is characterized by substantial interstate movement of fluid milk, both from the dairy farm to the processing/bottling plant, and from the plant to the ultimate consumer. Accordingly, throughout most of the Northeast, the minimum prices which fluid milk processors ("handlers") must pay to dairy farmers ("producers") or associations of dairy farmers ("cooperatives"), are established by "regional" Federal milk marketing orders, promulgated by the United States Secretary of Agriculture ("Secretary") pursuant to the Agricultural Marketing Agreements Act of 1937 ("AMAA"), 7 U.S.C., Sec. 601, *et seq.*, as amended.

7. Currently, and for many years prior thereto, the Secretary has issued and enforced but three such regional federal milk marketing orders in the Northeast: the "New England Federal Milk Marketing Order #1" (hereinafter "Order #1" or the "New England" federal order), which includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire (7 C.F.R., Section 1001.2); the "New York-New Jersey Federal Milk Marketing Order #2" ("Order #2" or the "New York-New Jersey Federal Order"), which includes most of eastern and central New York and northern New Jersey (7 C.F.R., Section 1002.2); and the "Middle Atlantic Federal Milk Marketing Order #4," which includes much of eastern Pennsylvania, southern New Jersey, Maryland, Delaware and portions of northern Virginia (7 C.F.R., Section 1004.2).

8. Plaintiff's Canton, Massachusetts plant is a "handler" regulated by said New England Federal Milk Marketing Order #1; and plaintiff's New York plant is a regulated "handler" pursuant to the New York-New Jersey Federal Milk Marketing Order #2. Accordingly, plaintiff's payment obligations to producers or cooperatives, and the minimum prices received by producers or cooperatives supplying said milk processing plants, are determined by the provisions of said Federal Orders #1 and #2, respectively.

9. Said pattern of regional federal minimum producer price regulation reflects the essentially interstate nature of commerce in the fluid milk industry throughout the entire Northeast, including New England. For instance, of the six New England states, only the two most sparsely populated—Vermont and Maine are "export" states: *i.e.*, dairy farmers within those two states produce far more milk than is consumed therein. This excess milk production is exported across state lines and sold to handlers who bottle milk for consumers in the more densely populated New England states. Moreover, a substantial portion of the milk sold to consumers in New England is produced on dairy farms located in the State of New York. A similar pattern of interstate commerce characterizes the fluid milk industry in Federal Milk Marketing Orders, Nos. 2 and 4. For instance, densely-populated New Jersey obtains most of its milk from New York and Pennsylvania, and a considerable quantity of producer milk is shipped from Pennsylvania to New York. And, the basic economic terms of that vast interstate commerce in fluid milk, including the prices paid by fluid milk handlers (buyers) and the prices received by dairy farmers (sellers) are determined and enforced pursuant to the provisions of the vast regional federal milk marketing orders referred to above.

10. As to the "export-import" situation in New England, according to the statistics published by the New England federal order Market Administrator, during the year 1991, about 72% of the producer milk received by handlers regulated under Federal Order #1 was produced on farms located in Vermont and New York, and a mere 7.8% was produced on Massachusetts dairy farms. Because the Commonwealth of Massachusetts contains about 40% of the population within the geographical coverage of the Federal Order, the Commonwealth is a decidedly import state—nearly 80% of the milk sold in Massachusetts is produced on dairy farms located within other states (primarily Vermont and New York).

11. For present purposes, the mechanics of the Northeastern federal milk marketing order may be summarized as follows: milk packaged for fluid consumption ("Class I" milk) commands the highest price in the marketplace; under the "marketwide pooling" provisions of federal orders, all dairy farmers supplying handlers in a federally-regulated market share proportionately in the benefit of the higher-priced Class I use, and conversely share proportionately the burden of carrying the market's surplus or lower-class uses. This is accomplished by mechanisms known as "marketwide pooling" and the "producer settlement fund," whereby handlers pay for raw milk in accordance with their own "use value," and all producers supplying the market are paid the same "uniform" or "blend" price which, subject to certain differentials not here relevant, reflects the marketwide weighted average "use" value of the milk purchased by all the handlers regulated by the Order.

12. In enacting the AMAA, Congress decidedly did not empower the Secretary to promulgate any provision pur-

suant to which the prices paid by handlers or received by dairy farmers are determined by the state in which the raw milk was produced, or the state within which the packaged milk is sold. Nor does any provision of a federal milk marketing order contain any "premium" price for farms located in a particular State, let alone at the "expense" of dairy farmers located outside of the "favored" jurisdiction. The several states can not validly "protect" the economic interest of their local dairy farmers to the detriment of buyers of out-of-state milk, even in the absence of federal milk marketing orders, because of well-settled Commerce Clause limitations, to which we now turn.

BACKGROUND—WELL-SETTLED COMMERCE CLAUSE LIMITATIONS ON STATE POWER TO IMPOSE ECONOMIC OR PRICE REGULATIONS ON OUT-OF-STATE MILK

13. The AMAA was adopted in 1937 in the aftermath of the Great Depression. But it took several years after 1937 until the validity of the Act and federal milk marketing orders promulgated thereunder were sustained by the United States Supreme Court, and federal milk marketing orders became prevalent in the Northeast.

14. Meanwhile, beginning in 1933, several states in the Northeast, led by New York, attempted to remedy the perceived problem of inadequate returns to their local dairy farmers by means of state law. This was accomplished primarily through the enactment of State milk control laws. To the extent that those state enactments impinged upon interstate commerce (*e.g.*, by attempting to insulate in-state farmers or dealers from competition with lower-priced out-of-state milk), such regulations uniformly were invalidated

on Commerce Clause grounds, beginning with the seminal case of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 79 L. ed. 1032 (1935).

15. Depression-born State milk "controls" thus led to the establishment of a basic and fundamental principle of Commerce Clause law which is still sound today, to wit, that in attempting to protect the economic interests (profits) of its own citizens, a State may not require out-of-state producers, or others engaged in interstate commerce, to "surrender whatever competitive advantages they may possess" in order to do business within the State (quoting from *Brown Forman Distillers v. New York Liquor Authority*, 476 U.S. 573, 580, 90 L. ed. 2d, 552, 560 (1986)).

16. Notwithstanding the foregoing well-settled Commerce Clause limitations, and notwithstanding the prevalence, and effectiveness, of federal milk marketing orders in the Northeast, within the last two years state agencies in two very populous Northeastern states have responded to local dairy farmer interests (pressure groups) by enacting programs which designedly: (a) provide for augmented (higher than federal order minimum) prices or returns for their local dairy farmers; and (b) insulate buyers of locally-produced milk from interstate competition by imposing upon handlers of non-locally produced milk an "assessment" or "compensatory payment" which in effect acts as a tariff or customs duty on the in-state sale of the finished product. The proceeds of that assessment or payment are in turn distributed only to in-state milk producers. Thus, local producers receive for their raw milk both the federally-mandated minimum price (paid directly by the handler-buyer) and, in addition, the state-imposed "premium" (paid by the state agency from monies exacted from *all* milk distributors,

including those distributors who purchased little [or no] locally-produced milk).

17. Those two Northeastern states which recently have adopted such "protectionist" schemes for the benefit of their local dairy farmers are New York and Massachusetts. New York's "program" was adopted in early 1991, and the Massachusetts "Pricing Order" challenged herein was promulgated by defendant Commissioner in February 1992. The two programs, although differing somewhat in their respective mechanics, are identical insofar as their economic "protectionist" intent and effect to wit: (a) they superimpose upon the underlying federal order a "premium" price for their local dairy farmers; and (b) exact from sellers of non-locally produced milk a "compensatory" payment, the entire proceeds of which are distributed only to in-state dairy farmers.

18. New York State's attempt to thus augment the returns (profits) of its dairy farmers immediately was challenged as violative of the Commerce Clause. And, in an opinion rendered on April 14, 1992 (after the promulgation of the Pricing Order challenged herein), the United States District Court for the Southern District of New York granted summary judgment in favor of the plaintiffs and against the defendant New York Commissioner of Agriculture and Markets on the grounds that insofar as his milk pricing order attempted to impose a "compensatory payment" on milk sold within New York State but produced on out-of-state farms (the proceeds of which were to be distributed to New York State dairy farmers), said pricing order was *per se* prohibited by the Commerce Clause. *Farmland Dairies and Lehigh Valley Dairy, Inc. et al. v. McGuire*, (Dkt. #91 Civ. 3642, Hon. Robert P. Patterson, Jr.).

THE COMMISSIONER'S 1992 PRICING ORDER

19. On January 28, 1992, the defendant Commissioner, purporting to be acting under Section 12 of M.G.L., Chapter 94A, the Massachusetts Milk Control Act, declared a state of emergency to exist in the Massachusetts dairy industry on the basis of which on February 18, 1992 the Commissioner issued a "Pricing Order" (amended on February 26, 1992) under Sections 10, 11 and 12 of said Chapter 94A. (A copy of the Declaration of Emergency and the "Pricing Order" as amended are attached hereto as Exhibits "A" and "B").

20. The economic protectionist intent (motive) of the Pricing Order is evident from its Preamble which states that: (a) the purpose of the Order is to set a "target minimum price to be paid by milk dealers to *Massachusetts* producers above the federally-established minimum milk price"; and (b) the Order's "terms and conditions" (described below) "take into consideration the *regional nature* of the flow of milk . . ." Those "terms and conditions" take the "regional nature" of the flow of milk "into "consideration" in a patently impermissible manner, to wit:

(a) the "Pricing Order" imposes a monthly "assessment" upon all licensed milk dealers doing business in Massachusetts (whether located in or out of the Commonwealth) based upon the difference between a state-mandated "target price" and the actual minimum "blend price" fixed by the New England Federal Milk Market Administrator, with respect to all Class 1 milk *sales* in Massachusetts (irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers); and

(b) provides that the amounts thus assessed are to be paid into the "Massachusetts Dairy Equalization Fund" (hereinafter "Fund") which monies are to be distributed monthly by defendant Commissioner pro rata to Massachusetts dairy farmers *only*.

21. The challenged Pricing Order represents economic protectionism both in intent and effect and thus directly burdens interstate commerce because it clearly and unequivocally:

(a) establishes a "premium" price for packaged milk sold in Massachusetts (regardless of where the raw milk was produced or processed), which is substantially in excess of the minimum prices established by the United States Secretary of Agriculture;

(b) protects that "premium" price from competition with lower-priced, federally-regulated out-of-state milk by imposing an "assessment" on the plaintiff and others similarly situated, which in actuality is a "customs duty" or "protective tariff" on the importation of producer milk from other states; and

(c) distributes the entire proceeds of that customs duty or tariff only to Massachusetts dairy farmers.

PLAINTIFF'S INJURY IN GENERAL

22. Plaintiff repeats the allegations of paragraphs 1 through 21 of the Complaint as fully set forth herein.

23. The challenged Pricing Order, as amended, requires all licensed milk dealers to file a monthly report and, at the same time, make the payment into the Fund on or before the 25th day of each month, based upon the previous month's Class I milk sales in Massachusetts. Said Pricing Order also requires that the monies thus paid into the Fund shall be distributed by the Commissioner to Massachusetts milk producers not later than the fifth day of the following month.

24. Pursuant to the express terms of the Pricing Order the total annual assessment against plaintiff will amount to approximately \$1,000,000 (\$234,361 during the last three months), all of which has been or will be distributed only to Massachusetts dairy farmers, despite the fact that nearly 80% of the raw milk purchased by plaintiff is produced by out-of-state dairy farmers.

25. The exaction of the aforesaid payments from plaintiff with respect to out-of-state milk sold in Massachusetts palpably violates plaintiff's rights, privileges and immunities pursuant to the Commerce Clause (and other federal constitutional and statutory provisions referred to hereinafter). Defendant therefore should be enjoined from attempting to exact said "assessment" from plaintiff and from distributing any of said funds to Massachusetts dairy farmers, most of which have no business relationship whatsoever with plaintiff.

26. In that regard, upon information and belief, there are some 400-odd Massachusetts dairy farmers, and plaintiff currently purchases milk from about 26 such producers. Thus, more than 90% of the "assessment" exacted by defendant from plaintiff will be distributed to dairy farmers

from whom plaintiff does *not* purchase any milk whatsoever.

27. Furthermore, and notwithstanding that the monthly payments exacted by defendant from plaintiff are *per se* invalid under the Commerce Clause (and upon other grounds set forth hereinafter), once the Commissioner has disbursed the funds, there is no practical way in which plaintiff can recover those funds from the recipients thereof.

28. Moreover, unless defendant is enjoined from disbursing said funds and/or required to maintain said funds, together with all interest thereon, in a separate account pending determination in this matter, defendant may sustain irreparable injury in that it will not be able as a practical matter to recoup the monies which thus have been exacted unlawfully from it.

29. Moreover, unlike most other licensees subject to the Pricing Order, the majority of the bottled milk processed by plaintiff for sale in Massachusetts is sold to consumers through Cumberland Farm's vertically-integrated dairy convenience stores. To the extent that plaintiff's stores thus compete for consumer milk sales with entities which obtain their raw milk supply from Massachusetts dairy farmers, defendant's unlawful exaction of the "assessment" with respect to out-of-state milk: (a) deprives plaintiff of the competitive advantage which its stores would otherwise enjoy; and/or (b) deprives plaintiff of the opportunity of passing along those lower raw milk procurement costs to its retail customers. By reason thereof plaintiff is sustaining, and will continue to sustain, loss, injury and damages to its business, sales and goodwill the amount of which is difficult (if not impossible) to measure.

30. For all of the foregoing reasons, plaintiff's remedy at law is inadequate.

**IRREPARABLE INJURY—
MILK DEALER LICENSE REVOCATION/SUSPENSION**

31. Plaintiff repeats the allegations of paragraphs 1 through 30 of the Complaint as fully set forth herein.

32. Under Massachusetts law, all persons engaged in the business of purchasing milk from producers, and otherwise handling milk within the Commonwealth must hold a milk dealer's license, which licenses are issued by defendant annually. Plaintiff has held such license continuously for many, many decades.

33. For the reasons set forth hereinabove and below plaintiff likely will prevail on its claim that defendant's Pricing Order is in violation of the Commerce Clause, but plaintiff will sustain irreparable injury if it were to continue to make monthly payments to defendant Commissioner pursuant to his Pricing Order.

34. Based upon defendant's prior conduct, plaintiff fears that even if it were to deposit the disputed assessments in a separate account (or, alternatively, to deposit such funds with the Clerk of this Court), defendant Commissioner nevertheless will attempt to revoke or suspend plaintiff's milk dealer's license.

35. Unless defendant is enjoined from attempting to do so, plaintiff will sustain irreparable injury in its business and properties, in violation of its rights under federal law.

**FIRST CAUSE OF ACTION
(Violation of the Commerce Clause)**

36. Plaintiff hereby incorporates by reference all of the allegations set forth in paragraphs 1 through 35 herein.

37. The application of the Pricing Order to plaintiff, and the exaction of the payments thereunder constitute an unreasonable and impermissible burden upon and obstruction of interstate commerce insofar as plaintiff is required to make any payment whatsoever with respect to the sale of milk in Massachusetts that was produced in another State.

38. Application of the Pricing Order to plaintiff therefore violates the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3.

39. Plaintiff will be irreparably injured unless this Court enjoins defendant from enforcing the Pricing Order against it, and also enjoins defendant from attempting to suspend or revoke plaintiff's milk dealer's license pending the Court's determination in this matter.

40. Plaintiff has no adequate remedy at law.

41. Plaintiff also is entitled to a refund of all payments heretofore exacted by defendant, together with interest and costs and to an order compelling defendant to recover any and all sums heretofore paid by him from said Fund to Massachusetts producers, or otherwise.

SECOND CAUSE OF ACTION
(Violation of the Civil Rights Act)

42. Plaintiff hereby incorporates by reference all allegations set forth in paragraphs 1 through 41 hereof as if fully set forth herein.

43. Application of the Pricing Order to plaintiff violates its rights, privileges and immunities under the United States Constitution.

44. Defendant, acting under color of state law, has deprived plaintiff of said rights under the Commerce Clause, and the Due Process and Equal Protection clauses of the United States Constitution, in violation of 42 U.S.C., Sec. 1983.

45. Plaintiff has been irreparably injured by the imposition and collection of said unlawful levy against it by defendant, and will continue to sustain irreparable harm unless this Court enjoins defendant from enforcing the Pricing Order against plaintiff.

THIRD CAUSE OF ACTION
(Violation of the Supremacy Clause)

46. Plaintiff repeats the allegations set forth in paragraphs 1 through 45 of this Complaint as if fully set forth herein.

47. As stated above, plaintiff's milk processing plants are "fully-regulated" handlers pursuant to the New England Federal Milk Marketing Order #1, and the New York-New Jersey Federal Milk Marketing Order #2, as promulgated by the United States Secretary of Agriculture pursuant to the provisions of the Agricultural Marketing Agreements Act of 1937, as amended, 7 U.S.C., Sec. 601 *et seq.* (hereinafter "AMAA").

48. The declared policy of Congress in enacting the AMAA, as stated therein, includes the express policy of protecting the "interest of the consumer by . . . authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish . . .". 7 U.S.C., Sec. 602(2)(b).

49. Furthermore, and with respect to Federal Milk Marketing Orders in particular, the AMAA expressly prohibits the Secretary from issuing an order which "prohibit[s] or in any manner limit[s], in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States." 7 U.S.C., Section 608c(5)(G).

50. Application of the Pricing Order to plaintiff, a fully-regulated handler pursuant to express provisions of the fed-

eral milk marketing orders established by the Secretary of Agriculture, thus is in irreconcilable conflict with both of the above-cited provisions of the AMAA. First, the Pricing Order has for its purpose the maintenance of prices to Massachusetts dairy farmers "above the level which it is declared the policy of Congress to establish" in the AMAA, as manifested by the actions taken by the Secretary in promulgating the aforesaid milk marketing orders. Secondly, application of the Pricing Order to plaintiff *per se* limits the marketing in Massachusetts of milk produced in "other production areas of the United States," and thus is in direct conflict with Section 8c(5)(G) of the AMAA (7 U.S.C., Sec. 608c(5)(G)).

51. The Pricing Order, as applied and enforced by defendant in his official capacity against plaintiff, stands as an obstruction to the full accomplishment of the Congressional purposes above stated, is in irreconcilable conflict therewith, and thus must give way to paramount federal law under the Supremacy Clause of the United States Constitution.

FOURTH CAUSE OF ACTION (Violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment)

52. Plaintiff repeats the allegations set forth in paragraphs 1 through 51 of this Complaint as fully set forth herein.

53. The application of the provisions of the Pricing Order against plaintiff constitutes deliberate, willful and arbitrary discrimination against plaintiff, is not reasonably related to any lawful public purpose or state police power or taxing power.

54. Defendant's actions pursuant to said Pricing Order therefore constitute the deprivation, under color of state law, of rights guaranteed to plaintiff under the Equal Protection and Due Process clauses of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, in violation of 42 U.S.C., Sec. 1983.

RELIEF REQUESTED

WHEREFORE, plaintiff prays for the entry of judgment in favor of plaintiff and against defendant for each of the following reliefs:

(1) A declaratory judgment that the Pricing Order as applied to plaintiff violates:

(a) the Commerce Clause of the United States Constitution;

(b) plaintiff's rights under the Due Process and Equal Protection clauses, made applicable to the States by the Fourteenth Amendment;

(c) the Supremacy Clause (U.S. Const., Art. V) and is thus unenforceable; and

(d) plaintiff's civil rights pursuant to 42 U.S.C., Sec. 1983.

(2) A preliminary and permanent injunction enjoining defendant, his employees, agents and attorneys, from attempting in any way to collect from plaintiff the so-called "equalization" assessments provided for in the Pricing Order; or from attempting to suspend or revoke plaintiff's milk dealers' licenses by reason of plaintiff's failure to pay any further assessments pending the determination of this Court;

(3) An order requiring defendant to refund all monies heretofore paid by plaintiff pursuant to the Pricing Order, together with interest and costs;

(4) An award of plaintiff's attorneys fees pursuant to 42 U.S.C., Sec. 1988; and

(5) Such other and further relief as may be just and proper in the circumstances.

Dated: November 20, 1992

**CUMBERLAND FARMS, INC.
DEBTOR-IN-POSSESSION**

By its attorney,

S/
Patrick P. Dinardo
(BBO #125250/BMA #03078)
Kathleen Provost
(BBO #555345/BMA #04097)
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800

Of Counsel

S/
Sheldon A. Weiss
225 Millburn Avenue
Suite 102
Millburn, New Jersey 07041
(201) 376-0230

Opinion and Judgment in Cumberland Farms, Inc.
v. LaFaver, *et al.*

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CUMBERLAND FARMS, INC.

vs.

JOHN LAFAVER, *et al.*

CIVIL NO. 92-70-P-H

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Like many states, Maine has found it necessary to take steps to protect its dairy farmers as an embattled species. Usually when states attempt to do this they run afoul of the Interstate Commerce Clause because their legislation discriminates. *See, e.g., Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714 (D. Minn. 1992); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Baldwin v. G.A. F. Seelig, Inc.*, 294 U.S. 511 (1935). Maine has attempted to avoid this pitfall by adopting a slightly different

approach from other states. It has applied an "excise tax"¹ uniformly to all packaged milk handled within Maine, regardless of its source. The tax is generated whenever the price of milk falls below a certain level. The proceeds of the tax then go into a special fund and are distributed largely to Maine dairy farmers. I conclude that, under current United States Court precedents, Maine's scheme passes constitutional muster because the tax is uniformly applied. Although Supreme Court precedents prohibit discriminatory taxes, they do not prevent a state from subsidizing a domestic industry. I conclude that that is what Maine has done here. Economists may consider this a distinction without a difference but, for historical and other reasons, the caselaw recognizes a difference.

FACTS

All parties have moved for summary judgment on the following facts. The Maine Dairy Stabilization Act (the "Act"), 36 M.R.S.A., Sect. 4541, was enacted in 1991, P.L. 1991, ch. 526, when the producer price of milk had dropped approximately 40 percent and the number of active dairy farms in Maine had fallen to 659—down from 1023 a decade earlier. Emergency Preamble to the Act, Shaw Aff., par. 5. The purpose of the Act was to help stabilize the Maine dairy industry during periods of price fluctuations. Preamble. It tried to do this by creating a stabilization fund to

¹I previously ruled that although the Act refers to its impost as a tax, the levy constitutes a fee for purposes of the Anti-Injunction Statute, 28 U.S.C., Sect. 1341.

support Maine milk producers,² Sect. 4544(1), financed through an "excise tax" on the handling in Maine of packaged milk destined for sale within Maine and subject to minimum retail prices set by the Maine Milk Commission. Sect. 4543(1).

The tax must be paid by the first handler of packaged milk in the state. *Id.* In most cases that is the wholesale handler (commonly referred to as the dealer); if the milk is packaged out-of-state, then the retail handler in Maine pays the tax. *Id.* The amount of tax is indexed to the "basic price" of milk, Sect. 4543(2), defined as the minimum Class I price of milk as set by the Maine Milk Commission. Sect. 4542(1). The index price is \$16 per hundredweight ("cwt"). When the basic price of milk drops below \$16 cwt, the amount of the tax varies along a graduated scale from \$.01 per quart (when the basic price is \$15.50 to \$15.99 cwt) to \$.05 per quart (when the basic price is below \$14 cwt). Sect. 4543(2). Thus, when the basic price falls, the amount of the tax rises. Since the revenues raised are largely distributed to Maine dairy farmers, the fee subsidizes Maine producers during periods of low producer prices.

Under the pricing scheme administered by the Maine Milk Commission, *see* 7 M.R.S.A. ch. 603, the amount of the excise tax is added, not to the minimum price paid to producers by dealers, but to the minimum wholesale price paid to dealers by retailers. Sect. 2954(2)(B). The minimum retail price, in turn, is fixed in reference to the minimum wholesale price. Sect. 2954(2)(C). Thus, the statutory mini-

²Ninety-four percent of the funds collected from the tax are distributed to Maine milk producers; four percent of the funds are earmarked for the Women, Infants and Children Special Supplemental Food Program of the United States Child Nutrition Act; and two percent of the funds are dedicated to cover administrative costs of the tax. Sect. 4544(2).

mum price paid by consumers of milk in Maine reflects the full amount of the tax.³

Maine dairy farmers ship approximately one half of their production out of state as raw liquid milk to be processed and retailed outside of Maine.⁴ The other half, processed and ultimately sold to consumers in Maine, accounts for over 95% of all in-state retail sales of liquid milk. The plaintiff, Cumberland Farms, together with a few other processors, accounts for the rest of the in-state wholesale and retail sales, its milk being primarily produced and wholly processed out of state and shipped to Maine in packages for sale to consumers.

Cumberland Farms is an "integrated operation," 7 M.R.S.A., Sect. 2951(4-A), in that it purchases raw milk from producers, processes the milk at its own facilities, packages the milk, ships the packaged milk to its own retail stores, and sells the milk directly to consumers. Within the Maine milk industry, Cumberland Farms is unique in this regard. Cumberland Farms is also unique for its retail sale in Maine of milk produced and processed outside the state. This gives Cumberland Farms a potential competitive advantage over in-state retailers of Maine milk, because the minimum producer price of milk produced in southern New

³For example, the minimum wholesale price set by the Maine Milk Commission in Order #93-03, effective Feb. 28, 1993, was \$1.78 per gallon. The excise tax per gallon amounted to \$.16. The retail margin was set at \$.20. Adding these sums together, the minimum retail price totalled \$2.14 per gallon.

⁴This milk is not subject to the tax because it never becomes subject to minimum retail prices set by the Maine Milk Commission. Sect. 4543(1).

England is less than the minimum price paid to producers in the state.⁵

⁵This advantage results from the overlap of federal and state regulation. In general, the federal government establishes the minimum producer price of milk paid to dairy farmers in various geographical marketing areas known as "orders." See 7 U.S.C. Sect. 608c. For instance, most of New England is encompassed within what is known as the New England Marketing Area, and the producer price of milk in that area is governed by Federal Milk Order No. 1. The state of Maine, however, is not included in any federal marketing area, and is not governed by federal milk orders. Nevertheless, milk produced in Maine and shipped into federal marketing areas for sale is subject to federal minimum producer prices. Similarly, federal minimum producer prices apply to milk originally sold for processing in a federally-regulated market area and subsequently shipped to Maine for retail sale. All of the milk sold by Cumberland Farms in Maine falls into this latter category.

As to milk produced, processed, and sold in Maine, the Maine Milk Commission sets minimum producer prices. 7 M.R.S.A. Sects. 2953-2954. In determining the minimum wholesale price to be paid to Maine dairy farmers, the Commission starts with the Federal Milk Order No. 1 price and adds an "over-order premium" reflecting various costs particular to Maine including the increased costs of production. Sect. 2954(2)(A). The Maine Milk Commission also sets the minimum dealer and retail prices for milk sold in Maine regardless of where it was produced and processed. The minimum wholesale price paid to dealers is calculated by adding a dealer margin and the amount of the handling tax to the minimum producer price. Sect. 2954(2)(B). The minimum retail price paid by consumers is calculated by adding a retail margin to the minimum wholesale price. Sect. 2954(2)(C). The result is that Cumberland Farm's minimum producer prices are regulated by federal order, and are thus lower than minimum producer prices in Maine (not considering any effects of local taxation or fees) even though Cumberland Farm's minimum retail milk prices are regulated by the Maine Milk Commission.

STANDING

As an initial matter, both the defendants and the intervenors⁶ challenge Cumberland Farm's standing.⁷ The nub of their argument is that since the burden of the dairy tax is passed on to consumers, Cumberland Farms has suffered no injury-in-fact and thus has no right to bring an action. See *Lujan v. Defenders of Wildlife*, 112 S. T. 2130, 2136 (1992). But Cumberland Farms is liable for the tax and must return payment to the state. This suffices to confer standing on Cumberland Farms. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984). I need not decide, therefore, whether current market conditions permit Cumberland Farms to pass the entire tax on to consumers.

COMMERCE CLAUSE

The Commerce Clause limits economic protectionism by restricting state-imposed regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 (1992). In order to determine whether Maine's law will withstand a Commerce Clause challenge, I must determine

⁶The intervenors, comprised principally of Maine dairy farmers, include Boston Milk Producers, Inc.; Agri-Mark, Inc.; Wayne Hapworth; Priscilla Rowbotham; Harold Larrabee; and Adrian Wadsworth.

⁷The defendants also request that I reconsider my decision not to dismiss the case pursuant to the Tax Injunction Act, 28 U.S.C. Sect. 1341. The defendants, however, fail to advance any new arguments regarding this issue, and their request to reconsider is **DENIED**.

whether it directly discriminates against interstate commerce, or indirectly affects interstate commerce and regulates evenhandedly.⁸ See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). If the regulation fits the first category, it is unconstitutional; if it fits the second category, I must compare the burden on interstate commerce to the local benefits.⁹ *Id.* If it fits neither category, it passes constitutional muster.

Cumberland Farms argues that the Maine statute places out-of-state producers at a competitive disadvantage in the Maine market, lessens price competition among dealers operating within the state, and insulates Maine farmers who supply milk for retail sale in Maine from the fluctuations of the regional and national markets. None of these conditions bears scrutiny.

The Act applies a uniform excise tax to all milk sold in Maine, regardless of its source. Thus, the Act does not affect handlers' economic decisions about where to pur-

⁸Since the challenged impost is levied on products that move in interstate commerce, I assume that the Act has some effect on interstate commerce.

⁹I do not expressly follow the four part analysis for a tax on interstate commerce described in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), because of my ruling that the impost is a regulatory fee rather than a tax for purposes of the Tax Injunction Act. But the result would be the same under that approach. See *Opinion of the Justices*, 601 A.2d 610, 617-19 (Me. 1991). Under the *Maryland* approach, a state's right to tax interstate commerce is limited, "and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Id.* at 754. Construing the impost levied by the Dairy Act as a tax, rather than a fee, I find that the first, second, and fourth parts of the four-part *Maryland* test are easily satisfied. See 601 A.2d at 617. The remaining part of this analysis is common to the inquiry I pursue here.

chase raw producer milk. The resulting subsidy paid to Maine producers may provide them with an advantage or insulate them from regional price fluctuations, but the United States Supreme Court has held that to be permissible: "The Commerce Clause does not prohibit all state action of that description with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis omitted). Similarly, the Act does not lessen price competition because the fee is levied evenhandedly on all dealers in the state. There are no exemptions for milk that is intended for sale in Maine. To the extent that the higher minimum retail price is actually translated into higher prices for consumers, all dealers and retailers are similarly affected.

Cumberland Farms also asserts that the Act exempts all Maine milk shipped in bulk out of state for sale elsewhere, thus improperly preventing the subsidy to Maine dairy farmers from hurting their competitive position in the interstate market. According to Cumberland Farms, this discriminates economically against milk produced outside the state and thus violates the Commerce Clause.

Maine, however, is entitled to enact laws "that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd.*, 468 U.S. at 271. What Maine may not do is burden foreign producers by attempting to tax them or indirectly subject them to Maine's pricing scheme. This is where other states' law have gone astray. For instance, the New York regulation invalidated in *Baldwin* attempted to regulate the price paid to producers of milk outside the state by requiring that the producer price conform to New York's prices. *Id.* at 521-522. The regulation struck down in *Mar-*

igold Foods, Inc. indirectly required Minnesota dairy processors to pay Minnesota's minimum price even on milk purchased from out-of-state producers, thereby negating the economic advantage that foreign dairy farmers with lower prices had over Minnesota dairy farmers. *Id.* at 722. The regulation struck down in *McGuire* had precisely the same effect on producers of milk outside of New York. *Id.* at 1251-53.

The Maine Dairy Farm Stabilization Act works differently. The Act imposes a uniform regulatory fee at the wholesale or retail level on all handlers of packaged milk in Maine. The impost is not based on the differential between in-state and out-of-state minimum producer prices. The Act neither equalizes the price paid to foreign or in-state producers nor creates any difference between the minimum dealer or retail price of Maine or foreign milk. Thus, the Act does not prevent foreign producers who sell their milk for less to Cumberland Farms from enjoying a price advantage over Maine dairy farmers. Furthermore, the Act leaves intact Cumberland Farm's advantage in selling milk on the Maine market that it has purchased at a lesser cost from out-of-state producers. Interstate commerce is not unfairly burdened by the exemption for milk produced in Maine but sold out-of-state. It is true that the proceeds are then used to benefit Maine milk producers, but current precedents permit this kind of economic protectionism.

Finally, Cumberland Farms argues that it is required to pay from its profit a subsidy to Maine dairy producers from whom it does not purchase milk. But under the Act the potential profits of all Maine milk retailers are similarly infringed by the impost. As was true of the nondiscriminatory use tax upheld in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), "[e]quality is the theme that runs through all the sections of the statute." *Id.* at 583. The

"stranger from afar" is subject to no greater burden as a consequence of the fee than the "dweller within the gates." *Id.* at 584.

As a result, I conclude that the levy imposed by the Act does not directly or indirectly affect interstate commerce and that it, along with the subsidy of Maine producers, does not violate the Commerce Clause.

SUPREMACY CLAUSE

Cumberland Farms argues that the Act is contrary to federal milk regulation because imposition of the fee effectively raises the federal minimum price it pays to producers outside of Maine for milk eventually sold on the Maine market. I have already found, however, that the Act does not have the effect of raising milk prices outside of Maine. It therefore does not conflict with federal law.

DUE PROCESS CLAUSE

Cumberland Farms maintains that the Act violates the substantive requirements of the Due Process Clause because it is arbitrary and unrelated to the legislative objectives that led to its enactment. It takes an extraordinarily bad piece of legislation to run afoul of this requirement in the area of economic regulation, *see Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955), and this Act comes nowhere near the line.

Cumberland Farms also contends that the Act violates the procedural requirements of the Due Process Clause because it establishes minimum prices without the hearings required by legislation governing operation of the Maine Milk Commission. Conflicts between two statutes, however, raise

questions of statutory interpretation, not a constitutional violation. There is no procedural due process violation.

CONCLUSION

Accordingly, for all the foregoing reasons, the plaintiff's motion for summary judgment is **DENIED**. The defendants' and intervenors' motions for summary judgment on the merits are **GRANTED**.¹⁰

SO ORDERED.

Dated at Portland, Maine this 3rd day of August, 1993.

S/D. Brock Hornby
United States District Judge

JUDGMENT

In accordance with the Order on Motions for Summary Judgment issued August 3, 1993 (Hornby, J.), judgment is hereby entered for the defendants and intervenors and against the plaintiff.

S/Kimberly A. Diamond
Deputy Clerk

Dated at Portland, Maine, this 4th day of August, 1993.

¹⁰Cumberland Farm's motion to strike the affidavit of Wellington is **GRANTED**. The intervenor's motions for oral argument and to submit a supplemental memorandum are **DENIED**.

FEDERAL ORDER #1 STATISTICS.* (ANNUAL 1977-1992)

TABLE I

Year	# of Producers	# of Producers in Maine	Daily Avg. Production Per Farm	Producer Receipts (million lbs.)
1977	8,030	602	1,703	4,993
1978	7,769	597	1,779	5,046
1979	7,497	580	1,860	5,089
1980	7,352	585	1,945	5,221
1981	7,042	596	1,981	5,093
1982	6,923	593	2,079	5,253
1983	6,836	604	2,197	5,483
1984	6,668	606	2,158	5,252
1985	6,350	534	2,330	5,399
1986	5,891	471	2,484	5,341
1987	5,412	402	2,619	5,173
1988	5,182	378	2,698	5,118
1989	4,931	341	2,764	4,975
1990	4,893	324	2,864	5,114
1991	4,829	339	3,012	5,309
1992	4,686	325	3,194	5,478

*Source: "Statistics—1977-1988," and Annual Reports for the years 1989 to 1992, as published by the Federal Market Administrator for the New England Milk Marketing Order.

34a

TABLE II

CLASS I AND BLEND PRICES (ZONE 21)¹

	M/W (at 3.5 bf)	Class I	Blended Price
1977	\$ 8.58	\$ 11.06	\$ 10.01
1978	9.57	11.86	10.86
1979	10.91	13.19	12.18
1980	11.88	14.09	13.06
1981	12.57	15.00	13.90
1982	12.49	14.76	13.61
1983	12.49	14.82	13.59
1984	12.29	14.52	13.38
1985	11.48	14.00	12.67
1986	11.30	13.62	12.43
1987	11.23	13.86	12.56
1988	11.03	13.38	12.22
1989	12.37	14.46	13.45
1990	12.21	15.49	13.95
1991	11.06	13.23	12.07
1992	11.88	14.51	13.08

¹For plants in zones nearer than Zone 21, the Class I and blended prices are higher by varying amounts up to 72 cents at plants in Zone 1. Conversely, the blended price and Class I price are lower by varying amounts at plants located in zones more distant than Zone 21.

35a

TABLE III

MONTHLY M-W PRICES 1989-1991
(at 3/5% bf)

Month	1989	1990	1991
January	\$11.90	\$13.94	\$10.16
February	11.26	12.22	10.04
March	10.28	12.02	10.02
April	11.09	12.32	10.04
May	11.12	12.78	10.23
June	11.33	13.78	10.58
July	11.76	13.43	10.99
August	12.39	13.09	11.50
September	13.10	12.50	12.02
October	13.87	10.48	12.50
November	14.69	10.25	12.48
December	<u>14.93</u>	<u>10.19</u>	<u>12.10</u>
Average	\$12.37	\$12.21	\$11.06

99th Congress
1st Session

Ordered to be printed
September 13, 1985

HOUSE REPORT 99-271, PART 1

Committee on Agriculture

to accompany

H.R. 2100

(EXCERPTS)

* * *

[1] BRIEF EXPLANATION

The major provisions of the Food Security Act of 1985 are briefly described below.

* * *

[2] The Dairy Unity Act of 1985—

(1) For the fiscal years 1986 through 1990—

(A) establishes price supports for milk under a formula that ties the support level to changes in the real cost of producing milk and adjusts the initial support level for each year to reflect changes in commercial demand for milk;

(B) authorizes the Secretary of Agriculture to adopt a milk supply-reduction program if projected surpluses ex-

ceed trigger levels, and requires him to do so if the projected surpluses exceed a higher trigger;

(C) provides for payments to dairy farmers who agree to reduce their production under the program;

(D) requires a reduction in the price of milk when a diversion program is in effect to cover costs of the program that exceed the costs to the Government of 5 billion pounds of milk; and

(E) directs the Secretary, when a milk diversion program is in effect, to purchase and distribute an additional 200 million pounds of red meat annually.

(2) Directs the Secretary to study whether case in imports interfere with the milk price support program.

(3) Creates a National Dairy Research Endowment Institute to be funded by revenues raised from milk producers and dairy product importers.

(4) Requires the Secretary to increase differentials in a number of specified milk marketing orders.

(5) Establishes a National Commission on Dairy Policy to study and make recommendations on the operation of the Federal milk price support program.

(6) Extends for five years (A) authority to transfer dairy products to the military and veterans hospitals, and (B) the dairy indemnity program.

* * *

[14] Title II—Dairy

GENERAL

H.R. 2100 is legislation designed to reduce surplus milk production and the cost of the dairy price support program. For the current fiscal year, price support purchases are estimated by the Department of Agriculture to exceed 11 billion pounds, milk equivalent, at a cost of \$1.7 billion annually.

H.R. 2100 will establish a new methodology of determining a milk support price by relating the costs dairy farmers face today with those in a three year base period, 1976-1978. This base period represents a time period during which milk supply and demand was fairly balanced. An index of "dairy-specific" input costs assigns a weight of 80 percent to certain production expenses of dairy farmers, 10 percent to the Consumer Price Index, and 10 percent to the opportunity cost of producing milk rather than selling cows for meat. The price support methodology under the bill changes also include: (1) an adjustment of the index of input costs to reflect changes in the real cost of producing milk as milk production per cow increases; (2) a pricing mechanism designed to relate the support [15] price to Government purchases thus making the support price more effectively responsive to demand; (3) a producer funded incentive program to encourage dairy farmers to reduce milk production on a partial diversion basis or whole-herd reduction basis; and (4) adjustments in the Class I differentials to more accurately reflect the cost of supplying and servicing these markets.

BACKGROUND

The dairy price support program puts a floor under the price of manufacturing grade milk through the purchase of dairy products (butter, cheese, and nonfat dry milk) by the Commodity Credit Corporation (CCC) at announced prices.

The dairy price support program does not set milk prices directly. The farm is supported through CCC's purchase of manufactured dairy products at prices set to enable handlers to pay farmers an amount, on the average, no less than the support price. The price actually paid to farmers for manufacturing grade milk is determined in the open market and is free to move above the support level, in response to supply and demand. Manufacturing grade milk prices are collected and reported by USDA as the Minnesota-Wisconsin (M-W) price series.

By undergirding all milk prices, the dairy price support program affects all producers of milk in the United States. In addition, about 80 percent of all milk is regulated by one of the 44 Federal milk marketing orders whose classified prices are influenced by M-W. Each order includes provisions for classifying and pricing milk according to use, with milk used for fluid products (Class I) being the use. Class I prices vary from order to order depending on the distance from the Minnesota-Wisconsin region, but all are based upon the Minnesota-Wisconsin series price. Consequently, all producers benefit from the price support program even though little or none of their milk produced may be purchased by the CCC.

* * *

[19] There is still a critical need to reduce milk production due to growing surpluses, and the increasing need to reduce and

control the budget deficit. Each month, since the end of the diversion, milk production has increased 3 to 8 percent from the previous year levels. In fact, milk production now exceeds commercial demand by more than 10 percent.

* * *

NEED FOR THE LEGISLATION

Because the diversion program was a new dairy policy concept, the subcommittee on Livestock, Dairy, and Poultry held hearings to determine the impact of the milk diversion program on the dairy and red meat industries. These hearings, as well as field hearings throughout the Nation indicated support for (1) the continuation of the present dairy price support program (2) the establishment of a new dairy pricing index to replace the parity concept; (3) the inclusion of a pricing mechanism to link the support price to prevailing supply and demand conditions; (4) the authorization of standby authority for a producer-funded diversion and whole-herd removal program; and (5) adjustments in Class I fluid milk differentials in existing federal milk marketing order.

Milk Price Support

* * *

[20] *Supply-demand pricing mechanism*

The use of a pricing mechanism is included in the bill, due to the fact that the previous parity formula has shown that a dairy index as a basic mover of milk prices cannot always accurately reflect the myriad of factors which influ-

ence the supply and demand for milk. Due to the fact that no index can fully respond to the many factors that affect the demand for milk, the Committee has included a supply-demand pricing mechanism in order to allow additional adjustments of the price support. This "sliding scale" is designed to relate the support to commercial demand and can be used to reduce the formula price when CCC purchases are projected to exceed five billion pounds, milk equivalent, and to increase it if CCC purchases are projected below three billion pounds, milk equivalent.

Diversion program

Since 1979, milk supplies have exceeded commercial consumption and government purchases have been excessive. Congress has addressed this problem through several legislative actions in the last five years. Most of these efforts have focused on freezing or reducing the support price in an attempt to discourage overproduction.

These policy changes have met with little, if any, success. Only the 15-month milk diversion, enacted by Congress in December 1983, has been successful in reducing surplus milk production and cutting the cost of the purchase program. During the diversion program, over \$1 billion in federal budgetary outlay savings were achieved. The program was almost entirely funded by dairy farmers through an assessment of 50 cents per hundredweight on all milk commercially marketed.

The Committee believes that producer-funded diversion program is a more effective and equitable way to reduce excess milk production. Consequently, the committee has approved authority for a standby diversion program for use when substantial adjustment in milk supplies is necessary. The Secretary will be empowered to implement a diversion

program when Government purchases at the prevailing support price are projected to be between five and seven billion pounds, milk equivalent. In the event that removals [21] are projected to be in excess of seven billion pounds, the Secretary will be required to implement such a program, with producers sharing the program's cost in both instances.

To assure a more permanent reduction in milk production, the Committee has expanded upon the provisions of the previous diversion program and lengthened it to two years. In addition to being able to contract with USDA for reductions of five to thirty percent of an individual producer's base, farmers will be able to contract to terminate milk production by selling all their dairy cows for slaughter or export. Under this feature of the program, contracting farmers would submit a bid for the amount per hundred-weight of milk that they would accept in exchange for agreeing to terminate milk production and to refrain from producing milk for a period of not less than three years. Additionally, the facility being used by the producer for milk production would be idled for at least three years.

The Committee believes that this program will achieve the desired reduction in the Nation's milk production in a manner which is equitable to dairy farmers and which will ensure that such reduction is permanent.

* * *

[22] *Federal Milk Marketing Orders*

The federal milk marketing order program is authorized by the Agriculture Marketing Agreement Act of 1937, as amended. Federal orders are part of a broad program of marketing arrangements and whereby the Secretary of Agriculture is authorized to stabilize market conditions by issu-

ing regulations which apply to handlers of milk and its products. The program is designed to achieve this orderly marketing by establishing terms and conditions which all affected milk processors must follow in dealing with producers. In 1984, over two-thirds of all milk sold to plants and dealers, and over 80 percent of the fluid grade deliveries in the United States were regulated by federal milk marketing orders.

Orders establish minimum prices which must be paid by handlers to farmers for milk used in various ways. The current minimum order prices for milk used in fluid form are, however, in many cases inadequate to cover the cost of supplying the fluid market. This has resulted in payments by handlers greater than the minimum order price in order to assure an adequate supply of milk for the fluid market. The variability of "over-order charges" has caused instability that the federal milk order program was designed to alleviate.

The last major changes made by the Department of Agriculture to Class I price differentials were in the late 1960's. Since costs, including transportation, assembly, and handling, have increased substantially during that time, the Committee feels it is necessary to adjust the fluid milk differentials in 35 of the 44 federal milk orders so that the prevailing minimum order prices will better cover the cost of supplying these markets. This action will reduce the need for over-order payments and providing equity among handlers supplying the market.

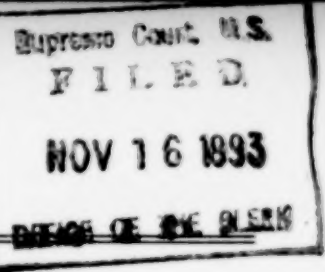
* * *

[23] The proposed changes in the marketing order minimums will more fully address the cost of transferring milk from the surplus areas to the deficit areas which in turn will assist

in providing a more uniform price to handlers or uniform payments to producers. At the moment, there are three major problems with respect to the operation of the Federal order systems: (1) minimum Federal order class I prices are not adequate to attract the necessary supply to meet the Class I needs in deficit area; (2) handlers who must go outside their territory to acquire additional milk incur greater [24] costs for milk than handlers who obtain all of their milk from the local area; and (3) those producers who assume the responsibility of supplying the needs of the market have to pay the cost of transporting supplemental milk, resulting in producers not receiving uniform prices.

There have been expressed concerns that implementation of minimum Class I prices would set a precedent in regard to management of Orders. The Secretary has not made permanent adjustments since the late 1960's. The Act does not suggest that milk be locally produced nor that it come from any specific area. It only requires that milk be attracted to those locations where it is needed for fluid use. The manner in which to attract milk is through adjusted prices. In deficit areas, that means the price must be high enough to cause it to be moved from where it is being produced to where it is needed. Class I differentials under the orders are not high enough to do this under today's cost of transportation. It now costs about 3.4 cents per hundredweight per ten miles to move milk; however, when the Class I differentials under Federal orders were established, it was at a rate of about 1.5 cents per hundredweight per ten miles. Despite this dramatic increase in transportation costs, the minimum prices have not been permanently increased.

8
No. 93-141



In The
Supreme Court of the United States
October Term, 1993

WEST LYNN CREAMERY, INC. and
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

GREGORY WATSON, COMMISSIONER OF
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Writ Of Certiorari
To The Massachusetts Supreme Judicial Court

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

State of Vermont
JEFFREY L. AMESTOY
Attorney General

by: EILEEN I. ELLIOTT
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTEREST OF THE AMICUS	1
II. SUMMARY OF ARGUMENT	2
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	3
A. THE MASSACHUSETTS PRICING ORDER AND HOW IT WORKS	3
B. THE COMMERCE CLAUSE FORBIDS THE ECONOMIC PROTECTIONISM INHERENT IN THE PRICING ORDER	6
a. The pricing order directly affects inter- state commerce and discriminates against out-of-state milk producers	7
b. The pricing order indirectly affects inter- state commerce by driving up the wholesale cost of milk	11
c. The burden on interstate commerce is not justified by the local benefits	12
V. CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases

<i>Baldwin v. G.A.F. Seelig</i> , 294 U.S. 511 (1934)...	9, 10, 11, 16
<i>Brown-Foreman Distillers v. New York Liquor Authority</i> , 476 U.S. 573 (1985)	7
<i>Farmland Dairies v. McGuire</i> , 789 F.Supp. 1243 (S.D.N.Y. 1992)	12
<i>Hood and Sons, Inc. v. DuMond</i> , 336 U.S. 525 (1948)	14, 16
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934).....	12
<i>New Energy Co. of Indiana v. Limbach</i> , 486 U.S. 269 (1988)	6
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978).....	17
<i>Polar Ice Cream and Creamery Co. v. Andrews</i> , 375 U.S. 361 (1964)	12
<i>West Lynn Creamery, Inc. v. Commissioner of the Dept. of Food & Agriculture</i> , 611 N.E.2d 239 (Mass. 1993).....	7, 8, 11, 13
<i>Wyoming v. Oklahoma</i> , 112 S.Ct. 789 (1992).....	6

OTHER AUTHORITIES

United States Constitution, Art. I, § 8, cl. 3	6
------------------------------------------------------	---

BRIEF OF AMICUS CURIAE

I. INTEREST OF THE AMICUS

In 1992, the Commissioner of the Massachusetts Department of Food and Agriculture ("the Commissioner") issued an Amended Pricing Order that requires Massachusetts milk dealers to pay monthly assessments of the fluid milk sold in-state during the previous month. The money is paid into the Massachusetts Dairy Equalization Fund and divided up and distributed among Massachusetts dairy farmers. Most of the milk on which the assessment is due comes from out-of-state farmers, yet only Massachusetts dairy farmers are entitled to share in the "equalization" fund.

The effects of the pricing order are not limited to Massachusetts, but, if permitted to stand, will directly depress the prices dealers pay to Vermont producers. The pricing order manipulates the wholesale cost of milk in Massachusetts, as well as in any other state that supplies milk to Massachusetts, to divert money that was formerly part of the price paid to out-of-state farmers for their milk to subsidize the Massachusetts dairy industry.

This regulation is pure economic protectionism that burdens interstate commerce by interfering with competition and favoring in-state interests at the expense of out-of-state milk producers. The public policy of federalism that binds this nation as an economic unit and prevents one state from prospering at the expense of its neighbor is abandoned under the pricing order. The state of Vermont, as Massachusetts' sister state, neighbor, milk supplier, and regional equal under the federal milk pricing legislation, is in a prime position to articulate both the

national and local public interest to be served by invalidating such a blatantly discriminatory regulation.

II. SUMMARY OF ARGUMENT

The Massachusetts pricing order violates the Commerce Clause by decreasing the income and competitiveness of Vermont farmers (and other out-of-state farmers who supply milk to Massachusetts dealers) while boosting the profits of Commonwealth producers. The Massachusetts law imposes a tax on all milk sold in the state, most of which comes from farmers in other states, and directs that the resulting revenues be paid only to Massachusetts producers. Vermont exports a great deal of milk to Massachusetts. Our farmers do not receive any of the subsidy money raised by their milk, nor are they free to reduce their milk prices to compete with the Massachusetts farmers because out-of-state milk is taxed in the same amount as in-state milk. This neutralizes competition while guaranteeing Massachusetts farmers a higher price for their milk as a result of the monthly subsidy. The assessment further burdens out-of-state farmers by increasing the cost of milk to dealers, and commensurately reducing those dealers' financial ability to negotiate and pay the premiums that have traditionally been the one area in milk pricing governed by competitive market forces.

III. STATEMENT OF THE CASE

The case is as stated by Petitioners.

IV. ARGUMENT

A. THE MASSACHUSETTS PRICING ORDER AND HOW IT WORKS

On a monthly basis, the federal government sets the minimum price that dairy farmers receive for their milk. The prices are set regionally, and Vermont and Massachusetts are in the same region and therefore bound by the same federal minimum. Under the federal pricing system, milk is priced in part depending upon its ultimate use. Class I milk is fluid milk, which commands the highest price. Ice cream, cheese, butter, dry milk powder, etc. fall in Classes II through III-A, and are priced lower. The monthly minimum price that farmers are paid for their milk is calculated as a blend of the four price classes.

The Massachusetts pricing order sets a new, higher Class I minimum price, and requires Class I dealers to pay, as an assessment, a percentage of the difference between the federal and state minimums into the equalization fund for the benefit of the Massachusetts farmers. Besides the obvious disparity in treatment that results because the in-state farmers are recipients of "equalization" funds that are denied their Vermont counterparts, the assessment hurts out-of-state farmers in two other ways. First, out-of-state milk is subject to the Massachusetts assessment, which drives up the mandatory minimum cost of their milk to Class I dealers. Out-of-state

farmers, who, unlike the in-state farmers, derive no advantage from the increase, are thus prevented from offering lower prices and competing with Massachusetts farmers for a larger share of the milk market. Second, the increased cost of the milk erodes the ability of fluid milk dealers to pay "over-order" premiums.

The over-order premium is the amount over the federal minimum price that a farmer is paid for his or her milk by dealers/processors of Class I fluid milk. The premiums are paid on fluid milk only, and are calculated using the Class I minimum price, rather than the lower blend price, as a base. Negotiated between individual farmer and dealer, the premiums provide the sole competitive, "free-market" opportunity to make a profit in the highly-regulated milk business, as well as the economic incentive for farmers to produce superior quality milk to sell to Class I dealers.

By forcing up the cost of the fluid milk to the dealer selling in Massachusetts, the Commissioner is conversely reducing the amount the dealer may be willing to pay to the farmer for Class I milk. For example, if a dealer is required to pay \$13.00 per hundred pounds (CWT) of fluid milk under the federal pricing order and is now required to pay an additional \$1.00 on that same CWT to the Commonwealth on behalf of the Massachusetts farmers, the base price has increased by \$1.00 for every CWT purchased. Increasing the cost of milk reduces the amount the dealer formerly had available to pay in over-order premiums. If a dealer had been paying \$.75 over-order to a farmer for Class I milk, for a total price of \$13.75/CWT, and he or she is now required to pay \$14.00 for the milk before even considering a premium, the over-

order premiums will be reduced to accommodate the cost increase caused by the assessment. Given the federally mandated minimum prices, and the enduring stability of consumer milk prices, the only area of flexibility to accommodate the cost increase is the over-order premium.

The Massachusetts farmer is insulated from the effects of a dealer's inability to pay over-order premiums at the pre-assessment rate by being the designated recipient of the assessment funds. The out-of-state farmer simply makes less on every CWT he sells. While theoretically the dealer is free to pay the assessment and the over-order premiums as before, as a practical matter, premiums are declining and the out-of-state farmers are forced to finance the assessment. See Affidavit of Leon J. Berthiaume.

The pricing order benefits the Massachusetts farmer through the combined effects of direct subsidy and handicapped competition. Massachusetts farmers are (1) guaranteed a higher minimum price for their Class I milk and (2) insulated from lower-priced out-of-state competitors whose prices are required to mirror their own. Conversely, the cost to the dealer of the out-of-state farmer's milk has been driven up, but the farmer is not permitted to reap the benefit of the increase, is not free to lower the price of his milk to gain in market share what was lost in revenues, and is no longer in a position to negotiate decent over-order premiums because the purchasing power of the dealers has been reduced.

B. THE COMMERCE CLAUSE FORBIDS THE ECONOMIC PROTECTIONISM INHERENT IN THE PRICING ORDER

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." Art. I, § 8, cl. 3. "It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

The Supreme Court has developed a two-tiered analysis to examine state regulatory attempts to determine whether the Commerce Clause has been violated.

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute had only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's burden on interstate commerce clearly exceeds the local benefits. We have also recognized there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the . . . balancing approach.

In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. (citations omitted)

Brown-Foreman Distillers v. New York Liquor Authority, 476 U.S. 573, 579 (1985).

There are aspects of the Commissioner's pricing order that meet all these tests, which affirms the Court's observation above that there is often no bright line distinction between direct and indirect effects on interstate commerce. The order directly regulates the cost of milk in states other than Massachusetts; it favors in-state interests over out-of-state interests with monthly subsidy payments; and it has a more subtle impact on interstate commerce because it blocks competitive pricing from out-of-state farmers while reducing the income they receive from over-order premiums. The modest benefit to the Massachusetts farmer from a monthly bonus payment does not cure the ailing dairy industry, does not safeguard a milk supply and certainly does not justify making it even harder than it already is for the beleaguered out-of-state farmer with a Massachusetts market to make a living from a dairy farm.

a. The pricing order directly affects interstate commerce and discriminates against out-of-state milk producers.

The lower court found the pricing order affected interstate commerce and burdened out-of-state producers, *West Lynn Creamery, Inc. v. Commissioner of the Dept. of Food & Agriculture*, 611 N.E.2d 239, 244, 245 (Mass. 1993), but concluded both effect and burden were

incidental. The court's analysis centered on the pricing order's impact on the milk dealer and its use of a state fund rather than price control measures, and ignored both the farmer and the nature of the milk market. "We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund." *Id.* at p. 243. This narrow focus on milk dealers obscured the central Commerce Clause issues in this case, and skewed the court's application of the above Commerce Clause analysis.

There is no question that the pricing order directly affects interstate commerce; the parties and the lower court agree that the assessment is imposed on all fluid milk sold in Massachusetts, including milk produced elsewhere and brought into Massachusetts for retail sale and consumption. Roughly two thirds of the milk sold in Massachusetts is produced out-of-state.

The order is likewise undeniably discriminatory on its face because the assessment money, which is collected on out-of-state as well as in-state milk, is paid only to in-state producers. Yet, the court reached three conclusions that led it to decide the pricing order is evenhanded: (1) in-state milk dealers are not favored over their out-of-state competitors; (2) the pricing order does not manifest any preference for in-state milk over out-of-State milk, and (3) the pricing order does not promote the sale of Massachusetts milk to the detriment of out-of-State producers. *Id.* at pp. 243-244.

Even if these conclusions are correct, however, they are not dispositive of the Commerce Clause issues in this case. The equal treatment of dealers does not excuse the disparate treatment of in-state versus out-of-state producers. Furthermore, the order does not need to manifest a preference for in-state milk or promote its sale to the detriment of out-of-state competitors on its face; it operates equally effectively by limiting the competitiveness and profitability of the out-of-state farmers, which preserves the market for in-state milk.

The distinction between direct and indirect effects on interstate commerce is not the same as the distinction between effects that are readily apparent from the face of the law and those that are not. In other words, a law may directly affect interstate commerce in ways that are not obvious from the face of the law. This is not a Commerce Clause case in which one state acts to exclude another state's products to create a greater market share for its own producers; if Massachusetts had a large enough dairy industry to expand to meet her citizens' milk needs, this pricing order would never have issued. Massachusetts is dependent on out-of-state milk, and seeks to capitalize on this influx to finance her farmers while protecting their share of the milk market. With its combination of price stabilization and competition suppression, the pricing order under review is a variant of the economic protectionism attempted and struck down in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 512 (1934).

In *Baldwin*, this court examined and rejected New York's effort to regulate the prices of out-of-state milk and suppress competition under the guise of insuring a fresh supply of wholesome milk. New York enacted a law that established a minimum price dealers were required to pay for milk produced by New York farmers to boost

the latter's income. If the regulation had stopped there, it would not have run afoul of the Commerce Clause, but it would have left the in-state farmers vulnerable to out-of-state competitors who would have cut their prices to undersell the New York prices. The regulations therefore required that all milk sold in New York had to be bought from farmers at the minimum New York price, regardless of where the farmer was located.

The Court held that New York's attempt to set the price paid for out-of-state milk sold in New York was economic regulation with an anti-competitive objective, and as such, burdened interstate commerce in violation of the Commerce Clause. "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Baldwin*, 294 U.S. at p.522.

It is likewise the avowed purpose and the necessary tendency of the instant pricing order to increase the income that Massachusetts milk producers earn on their milk while suppressing competition from out-of-state farmers to protect the market share held by Massachusetts farmers. If the assessment were only imposed on in-state milk, it would be cheaper for dealers to buy out-of-state milk to avoid paying the assessment. This "even-handed" application of the assessment to all milk regardless of origin is designed not to promote equality but to neutralize market forces and foreclose any competitive action out-of-state farmers would take to compensate for the fact that they are excluded from sharing in the subsidy funds. The pricing order ensures that the out-of-state

farmer is paid less for his milk in Massachusetts than his Massachusetts counterpart who receives the monthly kickback. The fact that the pricing order uses the mechanism of the Equalization Fund, rather than direct price setting, to establish milk prices paid to in-state and out-of-state farmers does not alter the discriminatory and anti-competitive purpose and effect of the order.

b. The pricing order indirectly affects interstate commerce by driving up the wholesale cost of milk.

The lower court found the unconstitutional aspect of the law invalidated in *Baldwin* was its establishment of a minimum price for milk, regardless of its point of origin. *West Lynn Creamery, Inc.*, 611 N.E. 2d at p.243. The Massachusetts Supreme Judicial Court reasoned that the instant case is distinguishable because the milk dealer's assessment is independent of the price paid to the farmer. This analysis, however, is grounded on the premise that the cost of milk to a milk dealer is distinct and unrelated to the price he is willing to pay the farmer for the raw milk. This ignores the realities of price setting in any market, not just the milk market.

The dealer is already required to pay the federal minimum price to the farmer for every CWT purchased. The pricing order imposes an additional amount the dealer owes on every CWT sold. Even though that additional amount is paid into a fund rather than directly to the producer, it is a cost of doing business like the purchase price. Indeed, the lower court explicitly recognized this: "[T]he premiums [assessments] represent one of the

costs of doing business in the Commonwealth, a cost all milk dealers must pay." *Id.* at p.245.

When the dealer's costs are increased, the price paid to the farmer is decreased. Consumer milk prices have remained flat for years due to intense competition at the retail level and will not absorb the increase. Therefore, because of the dual barriers imposed by the federal minimum threshold and the retail prices, the only area of pricing flexibility is the over-order premium, and that is where the reductions are felt.

c. The burden on interstate commerce is not justified by the local benefits.

Since the Commerce Clause prohibits a state from impeding interstate commerce solely to protect economic interests, a "health and welfare" motivation that is a legitimate interest to be pursued under a state's police power is invariably raised as the key motivation for the law under attack. In milk cases, this justification often takes the form of insuring a fresh supply of wholesome milk. *Nebbia v. New York*, 291 U.S. 502 (1934); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Farmland Dairies v. McGuire*, 789 F.Supp. 1243 (S.D.N.Y. 1992).

As in the present case, New York justified its law in *Baldwin* by claiming "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Baldwin*, 294 U.S. at 523. The Court rejected this

rationale as a contrivance to circumvent the principles of federalism that underlie the Commerce Clause.

To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin, 294 U.S. at 523.

The pricing order at issue is likewise premised on the Respondent's need to maintain a local milk supply. The Commissioner states "Massachusetts producers are facing an emergency situation due to these federally set prices Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk." Amended Pricing Order, I. Preamble.

The Respondent's stated interest in guaranteeing a "local supply of fresh milk" is not advanced by the pricing order. A local supply of milk has not been eliminated by the federal prices nor will it be restored or guaranteed by the "price stabilization" envisioned by the pricing order. Even the Supreme Judicial Court of Massachusetts recognizes this: "[W]e cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers." *West Lynn Creamery, Inc.*, 611 N.E. 2d at p.244.

Massachusetts' milk supply exists out of state; it has relied on other states' milk to meet its milk needs for

decades, if not longer. As far back as 1948, Boston obtained 90% of its fluid milk from states other than Massachusetts. *Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 526 (1948).

Vermont is one of those "foreign milk producers" on which Massachusetts relies for milk. It is a dairy export state; sparsely populated, rural in character, and, because it produces more milk than it consumes, economically dependent on out-of-state markets. Vermont farmers sell only 5% of their production in Vermont as Class I fluid milk; 45% is sent out of the state and the remaining 50% is manufactured or processed in-state into less-profitable Class II-III-A products, which in turn are largely shipped out of the state as well. Massachusetts is a large and important milk market to Vermont. Vermont farmers have the capacity and the means to supply more Class I milk to the Commonwealth. Yet, by making it unprofitable for out-of-state farmers to sell fluid milk in Massachusetts, the pricing order could decrease, rather than insure, a supply of wholesome milk to its citizens. Moreover, since the pricing order limits the competitiveness and reduces the premiums and therefore the income of out-of-state producers, it injures already struggling farmers in export states like Vermont and may further reduce the milk supply outside of Massachusetts by putting more farmers out of business.

The stated purpose of the pricing order is to address the "state of emergency" facing the Massachusetts dairy industry, which the Respondent attributes to the federal pricing system and the instability of prices Massachusetts producers are paid for their milk. Yet, the crisis confronting the dairy industry in Massachusetts, Vermont and the

nation is not the federal pricing system and the instability of the prices dealers pay farmers for their milk but the dual pressures of creeping urbanization and the increased efficiency of milk production techniques which create too much milk, depressing its price and making it more profitable to sell the family farm to a developer. The number of dairy farms and dairy farmers who can make a profitable living off the farm are becoming fewer and fewer, and unfortunately, it is an irreversible process; once dairy farms are transformed into subdivisions, there is no turning back. As disturbing as this trend is, it is not a sudden crisis nor is it unique to Massachusetts. In the last 30 years, Vermont has lost 68.2% of her dairy farms.

Vermont has the same sovereign interest as Massachusetts, and indeed any other state, in maintaining the economic viability of its dairy farmers. Vermont is an export state surrounded by other export states like Maine and New Hampshire, and therefore her farmers are especially dependent on the local import market Massachusetts provides and are especially vulnerable to the Commissioner's unfair pricing practices.

Although it would appear that the import/export relationship of the two states gives each state roughly equal bargaining power, the nature of milk tips the scales in favor of Massachusetts. Milk is perishable and cannot be conveniently stored; as fresh fluid milk, it must be shipped quickly to nearby markets. Nor can production be temporarily stopped until alternate markets are found; to be kept healthy, cows have to be milked frequently and regularly. Therefore, excess milk must be "dumped" if there is no market. Of course, the shelf life of milk can be extended by making it into powder or other processed

milk products, but the farmer is not paid as much as he or she is for Class I fluid milk which yields the aforementioned "over order" premiums.

The Commerce Clause prevents Massachusetts from capitalizing on the market dependence of its neighbors solely to bolster its own economy, and ensures that "our economic unit is the Nation," *Hood*, 336 U.S. at 537, rather than the separate states. In contradistinction to the aim and purpose of the Commerce Clause, the pricing order unfairly uses the regional nature of the milk market to generate funds for its farmers while it limits the competitiveness and the premiums of the "captive" out-of-state producers who would be hardpressed to find alternate markets for fresh milk.

The *Baldwin* court observed in the 1930's that "the milk market does not observe state lines," *Baldwin*, 294 U.S. at 512, and the Commissioner re-confirmed the present day truth in that statement in the preamble to the pricing order when he stated "[t]he terms and conditions of the Order take into consideration the regional nature of the flow of milk" Yet the order is a distinctly parochial effort designed to undermine this interdependence of states to boost the Massachusetts farmer's income in the short-term at the expense of the farmers in neighboring states that are tied to Massachusetts through the federal milk pricing system. The pricing order can not salvage the Massachusetts dairy industry, and does not provide a supply of fluid milk to the state's residents. Therefore, the burden the pricing order imposes on interstate commerce and its harsh anti-competitive effects on out-of-state farmers are not outweighed by local benefits,

which exist only as a wish list and not as a tangible solution to the dwindling dairy industry.

V. CONCLUSION

By insulating Massachusetts milk producers from competition and simultaneously paying them a subsidy based largely on out-of-state production, the pricing order damages and fragments the nation's dairy industry and does not address its problems. Favoring one state's producers at the expense of those in surrounding states weakens the fragile economics of Vermont's and New England's already beleaguered dairy farmers, it pits Massachusetts farmers against out-of-state farmers who resent the protectionist measures and recognize that the money being funnelled into the Massachusetts farmers' pockets comes from their efforts, and it undermines reams of federal precedent that forbids a state to protect its local economic interests by obstructing competition and "isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

WHEREFORE, the State of Vermont respectfully requests that this Court find that the pricing order violates the Commerce Clause of the U.S. Constitution.

Dated: November 11, 1993

Respectfully submitted,

State of Vermont
JEFFREY L. AMESTOY
Attorney General

EILEEN I. ELLIOTT
Assistant Attorney General
Ct. Id. # bma 09955

APPENDIX

AFFIDVAIT

1. My name is Leon J. Berthiaume. I am the General Manager of St. Albans Cooperative Creamery, Inc. ("St. Albans"). I have held that position since the end of 1991. I previously served as the Assistant Controller of St. Albans from 1984-1986 and the Controller from 1986-1991. I received a B.S. degree in Accounting from the University of Vermont, and am a registered Certified Public Accountant in Vermont.

2. St. Albans is an agricultural cooperative incorporated in the State of Vermont with its principal place of business in St. Albans, Vermont. All of its approximately 573 dairy farmer members are located in the State of Vermont. St. Albans markets its members' raw milk to fluid processing plants located in Massachusetts, New Hampshire, New York and Vermont, and manufacturing plants located in Vermont. St. Albans Cooperative Creamery also owns a processing facility located in St. Albans, where it produces cream, skimmed milk, skimmed condensed milk, and nonfat dry milk powder.

3. The Pricing Order effectively sets a minimum price for milk purchased from out-of-state farmers like St. Albans and sold after processing in Massachusetts. This minimum price is equal to the federal Class I minimum price plus one-third of the difference between the federal blend price and \$15.

4. The Pricing Order caused the market premium paid to St. Albans to decrease substantially. Just prior to the time that the Pricing Order came into effect, St. Albans was receiving a market premium of about 40 cents

per hundredweight. Because the Pricing Order raised the price paid to Massachusetts farmers, a processor buying significant quantities of milk from Massachusetts farmers, Garelick, was able to lower the market premiums that it paid voluntarily to Massachusetts farmers. Other Class I processors selling in Massachusetts buy more of their milk from out-of-state farmers, and they were forced to lower the market premium they paid to out-of-state farmers, including St. Albans, in order to maintain raw product costs comparable to Garelick, who buys more milk from Massachusetts farmers. Such processors included The Stop & Shop Company, Inc., a Massachusetts Class I dealer to whom St. Albans then supplied raw milk, as it still does today. The Market premium paid to St. Albans decreased to 20 cents per hundredweight.

5. If the Pricing Order only regulated the price of milk produced by Massachusetts farmers, St. Albans would be able to sell milk to additional Class I dealers to whom it is not currently selling milk. This would result from St. Albans' ability and willingness to sell milk at a price below that established by the Massachusetts Pricing Order.

/s/ Leon J. Berthiaume
Leon J. Berthiaume

Subscribed and sworn to before me
this 12th day of November, 1993

/s/ Doreen W. LaFlam
Notary Public
My Term Expires: 2/10/95

[SEAL]

9
No. 93-141

Supreme Court, U.S.
FILED

NOV 16 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
Petitioners,
v.

JONATHAN HEALY, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF OF THE MILK INDUSTRY FOUNDATION
AND THE FOOD MARKETING INSTITUTE
AS AMICI CURIAE SUPPORTING PETITIONERS

STEVEN J. ROSENBAUM *
ROBERT A. LONG, JR.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

* Counsel of Record

BEST AVAILABLE COPY

33pp

QUESTION PRESENTED

Whether a Massachusetts milk pricing order that requires milk processors to pay a premium on all fluid milk sold in Massachusetts, including milk purchased from out-of-state dairy farmers, and provides for distribution of the premium solely to Massachusetts dairy farmers, is invalid under the Commerce Clause.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	9
ARGUMENT	12
THE MASSACHUSETTS PRICING ORDER IS INVALID UNDER THE COMMERCE CLAUSE..	12
A. The Massachusetts Pricing Order Is Invalid Because It Amounts To Simple Economic Pro- tectionism	13
B. The Massachusetts Pricing Order Is Invalid Because It Facially Discriminates Against In- terstate Commerce	21
C. The Massachusetts Pricing Order Is Invalid Under the Balancing Analysis of <i>Pike v. Bruce</i> <i>Church</i>	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases:	Page
<i>Adams v. Watson</i> , No. 93-1068 (1st Cir., Aug. 13, 1993)	19
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984)	22
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	16, 17, 22
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	passim
<i>Best & Co. v. Maxwell</i> , 311 U.S. 454 (1940)	26
<i>Brown-Forman Distillers Corp. v. New York State Liquor Authority</i> , 476 U.S. 573 (1986)	12, 15
<i>California v. Thompson</i> , 313 U.S. 109 (1941)	26
<i>Cumberland Farms, Inc. v. Lafaver</i> , Civ. No. 92-70-P-H (D. Me. Aug. 3, 1993)	2, 24
<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349 (1951)	26
<i>Farmland Dairies v. McGuire</i> , 789 F. Supp. 1243 (S.D.N.Y. 1992)	2, 19
<i>Great Atlantic & Pacific Tea Co. v. Cottrell</i> , 424 U.S. 366 (1976)	26
<i>H.P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	14, 15
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	21
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	25
<i>Hunt v. Washington State Apple Advertising Commission</i> , 432 U.S. 333 (1977)	16, 18
<i>Lehigh Valley Cooperative Farmers, Inc. v. United States</i> , 370 U.S. 76 (1962)	2
<i>Lujan v. Defenders of Wildlife</i> , 112 S. Ct. 2130 (1992)	22
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986)	26
<i>Marigold Foods, Inc. v. Redalen</i> , 809 F. Supp. 714 (D. Minn. 1992)	2, 22
<i>Marigold Foods, Inc. v. Redalen</i> , Civ. No. 4-92-1084 (D. Minn. Oct. 20, 1993)	2, 12, 19
<i>Mintz v. Baldwin</i> , 289 U.S. 346 (1933)	26
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	13
<i>New Energy Co. v. Limbach</i> , 486 U.S. 269 (1988)	passim

TABLE OF AUTHORITIES—Continued

	Page
<i>Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978) ..	12, 17, 24, 26
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970) ..	11, 12, 25
<i>Polar Ice Cream & Creamery Co. v. Andrews</i> , 375 U.S. 361 (1964)	15, 20
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	24, 25
<i>Wyoming v. Oklahoma</i> , 112 S. Ct. 789 (1992)	12
Constitution, statutes and regulations:	
U.S. Const., art. I, § 8, cl. 3	12
7 U.S.C. § 608c (1988 & Supp. IV 1992)	2, 3, 4
7 C.F.R. § 1001.2 (1993)	3
7 C.F.R. § 1001.40	3
7 C.F.R. § 1001.50 (a)	3
7 C.F.R. § 1001.50 (b)	3
7 C.F.R. § 1001.50 (c)	3
7 C.F.R. § 1001.51	3
7 C.F.R. § 1001.51 (a)	3
Miscellaneous:	
Donald H. Regan, <i>The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause</i> , 84 Mich. L. Rev. 1091 (1986) ..	15, 21
Earl M. Maltz, <i>How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence</i> , 50 Geo. Wash. L. Rev. 47 (1981)	15
Michael E. Smith, <i>State Discriminations Against Interstate Commerce</i> , 74 Cal. L. Rev. 1203 (1986)	15
Richard B. Collins, <i>Economic Union As A Constitutional Value</i> , 63 N.Y.U. L. Rev. 43 (1988)	15
U.S. Department of Agric., Agric. Mktg. Serv., Dairy Div., <i>Dairy Market News</i> (Dec. 1992–Nov. 1993)	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-141

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
v. *Petitioners,*

JONATHAN HEALY, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF OF THE MILK INDUSTRY FOUNDATION
AND THE FOOD MARKETING INSTITUTE
AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

The Milk Industry Foundation ("MIF") is the national trade association of processors of fluid milk and fluid milk products. MIF has more than 200 members, including milk processors in all 50 States. MIF members process nearly 80% of all fluid milk and fluid milk products sold in the United States. Many MIF members purchase raw milk from dairy farmers in one State and resell fluid milk and fluid milk products in another State. MIF and its members thus share a strong interest in preventing the States from erecting barriers to interstate sales of raw milk.

The Food Marketing Institute ("FMI") is a nonprofit association that conducts programs in research, education, industry relations, and public affairs on behalf of its 1,500 members—food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 19,000 retail food stores with a combined annual sales volume of \$190 billion—more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. The supermarket serves as the purchasing agent of the consumer. As such, FMI has a strong interest in preserving choices and vigorous competition throughout the entire food chain on behalf of its supermarket members and the customers they serve—the American consumer.

The Court's decision in this case is likely to have effects well beyond Massachusetts. If Massachusetts succeeds in building a protective wall around its dairy industry, other States will follow its example. Indeed, at least three other States already have attempted to erect similar barriers to competition from out-of-state dairy farmers. See *Marigold Foods, Inc. v. Redalen*, Civ. No. 4-92-1084 (D. Minn. Oct. 20, 1993) (Minnesota); *Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714 (D. Minn. 1992) (same); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992) (New York); *Cumberland Farms, Inc. v. Lafaver*, Civ. No. 92-70-P-H (D. Me. Aug. 3, 1993) (Maine).

STATEMENT

1. *The Federal Milk Marketing Order System.* Since 1937, the price of raw milk has been regulated by the federal government under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 608c (1988 & Supp. IV 1992). See generally *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 78-81 (1962). Pursuant to the AMAA, the

Secretary of Agriculture has promulgated regulations establishing a series of milk marketing areas, each governed by a separate Federal Order. Federal Order 1 applies to Connecticut, nearly all of Massachusetts and Rhode Island, and portions of New Hampshire and Vermont. See 7 C.F.R. § 1001.2 (1993).

Each Federal Order establishes, *inter alia*, minimum prices that regulated milk processors (such as petitioners) must pay dairy farmers for raw milk.¹ The Secretary's price regulations classify milk according to its use. 7 U.S.C. § 608c(5)(A). Federal Order 1 establishes four classes of utilization: Class I includes primarily bottled milk; Class II includes soft milk products such as ice cream, yogurt, and cottage cheese; Class III includes butter and certain hard cheeses; and Class III-A includes nonfat dry milk. 7 C.F.R. § 1001.40. The federal regulations set a minimum price for each class of utilization. The highest price is assigned to Class I; the lowest price usually is assigned to Class III-A.²

Each regulated processor must pay a minimum price based on its utilization of raw milk. For example, if the

¹ Milk processors (sometimes referred to as "dealers") pasteurize, process, and package fluid milk and milk products. Dairy farmers are sometimes referred to as "milk producers."

² The Secretary determines a "basic formula price" based on a statistical sampling of prices paid by unregulated milk processors in Minnesota and Wisconsin to producers of Grade B milk. See 7 C.F.R. § 1001.51(a). This statistical sampling is known as the Minnesota-Wisconsin ("M-W") Price Series. The basic formula price (also known as the "M-W price") is determined each month and expressed in terms of a price per hundred pounds of milk ("hundredweight" or "cwt"). See *id.* § 1001.51. The Class III price is the M-W price, subject to specified adjustments. *Id.* § 1001.50(c). The Class II price is the Class III price plus approximately \$.10/cwt, again subject to specified adjustments. *Id.* § 1001.50(b). The Class I price is determined by adding a "fixed differential" to the M-W price for the second preceding month. (Thus, the Class I price for April is based on the M-W price for February.) Under Federal Order 1, the Class I differential is \$2.52. *Id.* § 1001.50(a).

processor sells only fluid milk products, it must pay at least the Class I minimum price for all its milk. If the processor uses 75% of the raw milk for fluid milk products and 25% for ice cream, it must pay the Class I minimum price for 75% of its milk and the Class II price for 25% of its milk.

Although the minimum price paid by the processor depends on its use of the raw milk, each dairy farmer subject to Federal Order 1 is entitled to receive a uniform minimum price for milk regardless of the use that is made of the farmer's milk. This result is achieved by pooling the proceeds of milk sales to all processors subject to the Federal Order and distributing the proceeds to dairy farmers according to a weighted average or "blend" price. See 7 U.S.C. § 608c(5)(B)(ii).

The Federal Milk Marketing Order System does not displace price competition among dairy farmers at price levels above the federal minimum price. If a regulated processor pays a dairy farmer more than the federal minimum price for raw milk, the dairy farmer keeps the difference—known as an "over-order premium"—between the actual price and the federal minimum price. Over-order premiums are not pooled or shared with other farmers. According to statistics published by the United States Department of Agriculture, sales to Class I processors in Massachusetts have commanded over-order premiums in recent years. See U.S. Dep't of Agric., Agric. Mktg. Serv., Dairy Div., *Dairy Market News* (Dec. 1992-Nov. 1993).

2. *The Massachusetts Pricing Order.* On February 26, 1992, respondent, acting pursuant to Massachusetts General Laws Chapter 94A, §§ 10-12, issued the amended Pricing Order at issue in this case.³ The preamble to the

³ The February 26, 1992, Order amended an Order of February 18, 1992. Respondent stated that the amended Order was issued "for technical, clarification purposes." Pet. App. A50.

Order states that "[t]he purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry." Pet. App. A41. The preamble continues:

This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product.

Id.

The Order requires processors (referred to as "dealers" in the Order) to pay a premium (the "Massachusetts premium") to Massachusetts dairy farmers for Class I milk. The Massachusetts premium is one-third of the difference between the "Massachusetts target price" (\$15/cwt) and the federal blend price for the second preceding month. The Order requires all milk processors to pay the Massachusetts premium into a "Pricing Order Fund." A processor's required monthly payment to the Fund is the Massachusetts premium multiplied by its sales of Class I milk for consumption in Massachusetts. The Order applies both to Massachusetts processors and to out-of-state processors that sell Class I milk in Massachusetts. Processors must pay the Massachusetts premium without regard to whether they purchase milk from Massachusetts dairy farmers or from out-of-state dairy farmers. Pet. App. A43-A45.

The Order provides that the Massachusetts premium will be distributed solely to Massachusetts dairy farmers. The premium is distributed under a formula designed to ensure that Massachusetts farmers receive a minimum price of \$15/cwt for their milk. Out-of-state farmers are not eligible to receive any distributions from the Massachusetts Pricing Fund. Pet. App. A45-A47.⁴

⁴ The total amount of milk produced by Massachusetts dairy farmers is roughly one-third the total volume of Class I milk sold

The operation of the Massachusetts Order may be understood by considering an example. Suppose the applicable blend price under Federal Order 1 is \$12/cwt. The Massachusetts premium is one-third of the difference between \$15 and \$12, or \$1/cwt. Under the Massachusetts Order, processors are required to pay this \$1/cwt premium on all Class I milk they purchase for consumption in Massachusetts, including milk purchased from out-of-state farmers. If a processor sells 1 million cwt of Class I milk in Massachusetts each month, it is required to pay a premium of \$1/cwt, or \$1 million. Even if the processor purchases 100% of its milk from out-of-state farmers, it is required to pay a \$1 million premium, and the \$1 million is distributed solely to Massachusetts farmers.

3. Petitioners operate fluid milk processing plants in Massachusetts. Petitioner West Lynn Creamery buys approximately 97% of its milk from dairy farmers in New York and Maine; it buys the remaining 3% from farmers in Massachusetts. Petitioner LeComte's Dairy buys all its raw milk from West Lynn Creamery. Petitioners process the raw milk and sell fluid milk for consumption in Massachusetts. Pet. App. A3; Pet. 4.

Petitioners paid the Massachusetts premium in April and May 1992, but thereafter discontinued payments.

by processors for consumption in Massachusetts. See Record of Proceeding Before the Commissioner of Food and Agriculture, Exh. EE, at 92 (Sept. 14, 1992). Accordingly, the amount distributed to Massachusetts farmers under the Order per hundredweight of milk produced is about three times the amount collected from processors per hundredweight of Class I milk sold. Thus, the "Massachusetts premium"—one-third of the difference between the federal blend price and \$15—will result in an effective price to Massachusetts farmers of roughly \$15/cwt. For example, if the federal blend price is \$12/cwt, the Massachusetts premium will be \$1/cwt, and the additional amount received by Massachusetts farmers under the Order will be roughly \$3/cwt of milk production.

On July 24, 1992, petitioners filed an action in the Massachusetts Superior Court contending that the Pricing Order violates the Commerce Clause. Petitioners sought an injunction, declaratory relief, and damages. On July 31, 1992, the Superior Court denied petitioners' request for an injunction on the ground that they had not shown that they would be irreparably harmed in the absence of an injunction. Pet. App. A5-A6.

In June and July 1992, respondent initiated administrative actions against petitioners to suspend or revoke their licenses for failing to comply with the Pricing Order. Pet. App. A6. On November 16, 1992, respondent conditionally revoked petitioners' licenses. *Id.* at A27-A40. After the Superior Court denied petitioners' renewed request for an injunction, *id.* at A22-A24, a single justice of the Massachusetts Appeals Court issued an order staying the license revocations. *Id.* at A17-A21.

4. The Supreme Judicial Court of Massachusetts granted review on its own motion and held that the Pricing Order does not violate the Commerce Clause. Pet. App. A1-A13. The court acknowledged that the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Pet. App. A8 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988)). But the court concluded that "the pricing order does not discriminate [against interstate commerce] on its face, is evenhanded in its application, and only incidentally burdens interstate commerce." Pet. App. A9.

The court reasoned that the Pricing Order is "evenhanded in its design and effect" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund." Pet. App. A9. The court also concluded that "[t]he pricing order does not establish a minimum price milk dealers must pay

for milk regardless of point of origin.” *Id.* at A10. In support of that conclusion, the court noted that the Massachusetts premium is determined by the Massachusetts target price of \$15, the federal minimum price, and the amount of milk the dealer sells for consumption in Massachusetts. *Id.*

The court further concluded that “[t]he pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers.” Pet. App. A10. Because “the premium required under the pricing order is independent of the price paid for the milk or its point of origin,” processors “have every reason to seek out the lowest unit price for milk.” *Id.*

The court assumed that petitioners have standing to argue that the Pricing Order prevents out-of-state farmers from competing with in-state farmers, but rejected that argument on the merits. The court was “not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers.” Pet. App. A10.

Finally, the court assumed that petitioners have standing to argue that distribution of premium payments solely to in-state farmers is discriminatory and burdens interstate commerce. The court recognized that “[c]ommon sense necessitates” the conclusion that the fund distribution plan has an adverse effect on interstate commerce. Pet. App. A11. The court nevertheless held that “the burden is incidental given the purpose and design of the program,” which is to provide “an infusion of capital designed solely to save an industry from collapse.” *Id.*

The court distinguished this Court’s decision in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, the State of New York prohibited processors from selling milk purchased from out-of-state farmers unless they paid the New York minimum price for the milk. The Massachusetts court concluded that the Massa-

chusetts Pricing Order “cannot fairly be said to be discriminatory or protectionist as was the [law] at issue in *Baldwin*.” Pet. App. A12.

SUMMARY OF ARGUMENT

The Commerce Clause limits the power of the States to discriminate against interstate commerce. This “negative” aspect of the Commerce Clause prohibits the States from engaging in economic protectionism—*i.e.*, in measures designed to benefit local economic interests at the expense of out-of-state competitors. A state law that amounts to simple economic protectionism is virtually invalid *per se* under the Commerce Clause.

1. The Massachusetts Pricing Order is an unconstitutional exercise in economic protectionism under this Court’s seminal decision in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, the Court unanimously struck down a New York law that prohibited milk processors from selling milk purchased from out-of-state dairy farmers unless the processors paid the farmers no less than New York’s minimum price for raw milk. The Court concluded that the law “set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.” *Id.* at 521. The Court held that the Commerce Clause prohibits States from enacting laws “with the aim and effect of establishing an economic barrier against competition with the products of another state.” *Id.* at 527. The Court has relied upon and reaffirmed the principles of *Baldwin* in many subsequent cases.

a. Under *Baldwin* and subsequent decisions of this Court, a finding that state legislation constitutes economic protectionism may be based either on the purpose or the effect of the legislation. The purpose of the Massachusetts Pricing Order is to protect the Massachusetts dairy industry from assertedly “ruinous” price competition with

out-of-state dairy farmers. The Order itself, as well as respondent's findings in support of the Order, make clear that the State's purpose is to erect an economic barrier around Massachusetts farmers that prevents them from losing sales to more efficient out-of-state competitors. That is precisely the protectionist purpose that is forbidden under the Commerce Clause.

b. The Massachusetts Order has the same protectionist effect as the New York law struck down in *Baldwin*: it stifles price competition between in-state and out-of-state dairy farmers by setting a minimum price for Class I milk. Under the Massachusetts Order, processors who purchase milk from out-of-state farmers are required to pay a minimum price equal to the sum of the federal minimum price and the Massachusetts premium. As a result of the Massachusetts Order, processors no longer have the economic incentive or the ability to buy milk from out-of-state farmers who are willing to sell for less than the Massachusetts minimum price. Moreover, out-of-state farmers are prevented from reaping the rewards of their greater efficiency by making additional sales of milk for consumption in Massachusetts.

There is no basis for the Massachusetts Supreme Judicial Court's conclusion that the Massachusetts Pricing Order does not establish a minimum price for milk. See Pet. App. A41 ("This Order sets a target minimum price."). Under the Order, Class I processors must pay at least the sum of the federal minimum price plus the Massachusetts premium for out-of-state milk. It makes no difference that processors pay a uniform premium for in-state milk as well as out-of-state milk; uniform minimum price laws are unconstitutional under *Baldwin*.

2. The Massachusetts Pricing Order is also invalid under the Commerce Clause for an additional reason that was not present in *Baldwin*. The Massachusetts Order facially discriminates against interstate commerce by requiring processors to pay a premium for both in-

state and out-of-state milk, and then distributing the premium only to in-state dairy farmers. The Order thus provides a direct commercial advantage to Massachusetts dairy farmers, and deprives out-of-state farmers of the same advantage simply because they are located in other States.

The Massachusetts Order cannot be justified as a constitutionally permissible subsidy to state industry. Massachusetts has not appropriated funds from the state treasury to support local dairy farmers. Instead, Massachusetts requires milk processors to pay a premium to in-state farmers whether or not the processors buy in-state milk. The Massachusetts Order thus is an unconstitutional "regulation of interstate commerce" that is "designed to give its residents an advantage in the marketplace." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis omitted).

3. Both the purpose and the effect of the Pricing Order are nakedly protectionist; consequently, the Massachusetts court erred in applying the constitutional balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In any event, the Order is invalid even under *Pike*. The *Pike* analysis focuses on the nature of the local interest involved and whether it could be promoted as well with a lesser impact on interstate activities. The State interest involved is protection of local dairy farmers against out-of-state competition; Massachusetts does not even advance a noneconomic interest such as the protection of health, safety, or the environment. Moreover, the State's asserted interest in protecting its dairy industry could be promoted as effectively through direct subsidies to dairy farmers, tax relief measures, or state loan programs.

ARGUMENT

THE MASSACHUSETTS PRICING ORDER IS INVALID UNDER THE COMMERCE CLAUSE

The Commerce Clause provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States” U.S. Const., art. I, § 8, cl. 3. “It is long-established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce.” *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (citing authorities). “This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) (citing authorities). It is also well established that if a state law “amounts to simple economic protectionism,” the Court applies “a ‘virtually *per se* rule of invalidity.’” *Wyoming v. Oklahoma*, 112 S. Ct. at 800 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).⁵

The Massachusetts Pricing Order at issue in this case is an exercise in economic protectionism. The Order has both the purpose and the effect of protecting the Massachusetts dairy industry from out-of-state competition. Accordingly, the Order is invalid under the Commerce Clause. See *Marigold Foods, Inc. v. Redalen*, Civ. No. 4-92-1084 (D. Minn. Oct. 20, 1993) (holding unconstitutional, on motion for preliminary injunction, Minnesota law substantively identical to Massachusetts Pricing Order).

⁵ If “a statute has only indirect effects on interstate commerce and regulates evenhandedly,” the Court has “examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

A. The Massachusetts Pricing Order Is Invalid Because It Amounts To Simple Economic Protectionism

1. In the leading case of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court struck down, as invalid under the Commerce Clause, a New York statute that “set up a system of minimum prices to be paid by dealers to producers.” *Id.* at 519. Justice Cardozo’s opinion for a unanimous Court recognized that the Commerce Clause did not prevent New York from setting a minimum price for milk that was both produced and consumed in New York. *Id.* (citing *Nebbia v. New York*, 291 U.S. 502 (1934)). But New York did not stop there. If the State had simply established a minimum price for New York milk, processors would have had an economic incentive to purchase milk at lower prices from dairy farmers in other States. “To keep the system unimpaired by competition from afar,” New York decreed that “there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state.” 294 U.S. at 519.⁶

The Court concluded that the New York law “set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.” *Id.* at 521. The Court observed that “[n]ice distinctions . . . between direct and indirect burdens” on commerce “are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.” *Id.* at 522. The Court recognized that “[i]f New York, in order to

⁶ The New York law at issue in *Baldwin* thus was facially “evenhanded” in its treatment of in-state and out-of-state milk. But contrary to the Massachusetts Supreme Court’s conclusion, see Pet. App. A9, such “evenhandedness” did not save the law from constitutional attack.

promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.*

The Court rejected the State's contention that the minimum price law was a permissible measure intended to ensure "a regular and adequate supply of pure and wholesome milk." *Id.* at 523. The Court concluded (*id.* at 527):

What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.

This Court has relied upon and reaffirmed the principles of *Baldwin* in many subsequent cases. In *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the Court held that a State may not block the expansion of a milk processing plant in order to reduce competition between in-state consumers and out-of-state consumers for locally produced milk. Justice Jackson's opinion for the Court observed:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look

to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539. In *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964), the Court invalidated Florida regulations that effectively reserved the market for Class I milk to in-state dairy farmers. The Court, observing that "[t]he principles of *Baldwin* are as sound today as they were when announced," *id.* at 375, ruled that "the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition with other States." *Id.* at 377; see also *Limbach*, 486 U.S. at 275 (*Baldwin* is "the leading case"); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) (citing *Baldwin* for the proposition that a State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess").⁷

⁷ See generally Richard B. Collins, *Economic Union As A Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988) (arguing the primary function of Commerce Clause is to promote a national common market); Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 65 (1981) (arguing that Commerce Clause embodies principle that "individual businesspersons should be free to operate commercially in any state where such operations are legal and should not be denied access to markets or resources based upon that choice"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1245-57 (1986) (arguing that the Court's Commerce Clause decisions properly have been concerned with preventing States from engaging in purposeful economic protectionism); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1204 (1986) (analyzing Commerce Clause cases and concluding that "discriminatory regulations are almost invariably invalid").

2. The Court's decision in *Baldwin* rested in part on the "avowed purpose of the obstruction . . . to suppress or mitigate the consequences of competition between the states." 294 U.S. at 522. Subsequent decisions of this Court establish that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

In this case, as in *Bacchus Imports*, the Court "need not guess at the [State's] motivation." 468 U.S. at 271. The preamble to the Pricing Order states that its purpose "is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry" by setting "a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price." Pet. App. A41. The preamble further states that the purpose of the Order is to "stabiliz[e] the price producers are paid" at a level that "yield[s] a reasonable return" to Massachusetts farmers. *Id.* Moreover, the preamble expressly acknowledges that the "terms and conditions of the Order take into consideration the regional nature of the flow of milk." *Id.* Thus, the purpose of the Massachusetts Pricing Order is to protect Massachusetts dairy farmers from assertedly "ruinous" price competition with dairy farmers in other States.

Respondent's findings in support of the Pricing Order (Pet. App. A51-A57) confirm that its purpose is to protect the Massachusetts dairy industry from out-of-state competition. Respondent found that "we must act on the state level to preserve our local industry" and to "maintain reasonable minimum prices for the dairy farmers." *Id.* at A57. Respondent found that Massachusetts dairy farmers "lost an average of \$2.86/cwt" in 1991. *Id.* at A53. Respondent concluded, "If no action is taken, the entire New England dairy industry will collapse and milk

will be imported from greater and greater distances." *Id.* at A55.⁸

The evidence concerning the State's purpose establishes that the Pricing Order is precisely the type of "parochial legislation" that the Court "has consistently found . . . to be constitutionally invalid." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). "[I]t is irrelevant to the Commerce Clause inquiry that the motivation of the [State] was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Bacchus Imports*, 468 U.S. at 273. Similarly, it makes no difference that the preamble to the Order states (Pet. App. A41) that, as a result of the Order, "consumers will be assured of a local supply of fresh milk," because that very purpose was rejected as unconstitutional economic protectionism in *Baldwin*. See 294 U.S. at 522-23; *Philadelphia v. New Jersey*, 437 U.S. at 627. Moreover, the Order is not saved by respondent's determination that Massachusetts dairy farmers are facing an economic crisis. It is well settled that "the propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either 'thriving' or 'struggling.'" *Bacchus Imports*, 468 U.S. at 273.⁹

⁸ The Supreme Judicial Court accepted these statements of purpose. Its opinion recites the preamble to the Pricing Order, Pet. App. A4-A5 n.8, and states that the purpose of the Order is "to boost the amount of money local dairy farmers—the producers—receive for milk above and beyond that required by the Federal program." *Id.* at A4.

⁹ The same considerations rule out the possibility that respondent can validate the Pricing Order "by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Limbach*, 486 U.S. at 278. As the Court noted, "[t]his is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so." *Id.* In this case, respondent has not even advanced a nonprotectionist purpose for the Order.

3. The Massachusetts Pricing Order, like the New York law struck down in *Baldwin*, effectively establishes a minimum price for out-of-state milk and thereby "strip[s] away" from out-of-state dairy farmers "the competitive and economic advantages [they have] earned for [themselves]." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 351. The Commerce Clause prohibits States from engaging in such naked economic protectionism.¹⁰

The Massachusetts Pricing Order requires Class I processors who purchase milk from out-of-state farmers for resale in Massachusetts to pay a minimum price equal to the sum of the federal minimum price plus the Massachusetts premium. The Massachusetts premium plainly raises the total minimum price processors must pay for Class I milk, as well as the total minimum price that Massachusetts farmers receive for milk.¹¹ Under the Order, processors can no longer obtain milk from out-of-state farmers at the federal minimum price or at any privately negotiated premium less than the Massachusetts premium. By depriving processors of any economic incentive to buy milk from low-cost producers, the Order

¹⁰ It is well established that a state regulation that on its face restricts both interstate and intrastate transactions may violate the Commerce Clause if it has the "practical effect" of discriminating against interstate sales. *Hunt*, 432 U.S. at 350; *Baldwin*, 294 U.S. at 522.

¹¹ The Massachusetts Order would be invalid even if out-of-state farmers received the Massachusetts premium on their sales for consumption in Massachusetts. See *Baldwin*, 294 U.S. at 521-22. As discussed below, see pp. 21-25, *infra*, the Order is invalid for the *additional* reason that premiums on out-of-state purchases are diverted to in-state farmers. The Massachusetts premium is not equivalent to an excise tax on raw milk because it is paid directly to dairy farmers. See Pet. App. A47 ("All amounts received pursuant to this Order shall be distributed . . . directly to Massachusetts producers . . .").

insulates Massachusetts dairy farmers from competition with out-of-state dairy farmers.¹²

By the same token, the Order prevents out-of-state farmers from reaping the rewards of their greater efficiency by making additional sales to Massachusetts processors. The Massachusetts premium thus "has the same practical effect" as the New York law struck down in *Baldwin*: "processors will pay a minimum price . . . even when the milk is produced out-of-state. As a result, the incentive to purchase milk from out-of-state will be reduced." *Marigold Foods, Inc.*, slip op. at 13. *Accord Farmland Dairies v. McGuire*, 789 F. Supp. at 1254 (S.D.N.Y. 1992) (holding unconstitutional New York law requiring compensating payments to be made to in-state farmers if processor buys milk from out-of-state farmers at less than State's minimum price).¹³

¹² In *Adams v. Watson*, No. 93-1068 (1st Cir. Aug. 13, 1993), *withdrawn and vacated* (Sept. 23, 1993), the court initially held that certain out-of-state dairy farmers lacked standing to challenge the Massachusetts Order, based largely on the court's mistaken belief that the Order creates an economic incentive for processors to purchase *additional* out-of-state milk. The court incorrectly believed that disbursements to in-state farmers under the Order are based only on Class I processors' purchases of in-state milk; in fact, in-state farmers receive disbursements regardless of the existence or level of in-state purchases. After the parties filed a brief explaining this crucial error, the court withdrew its opinion and vacated its judgment.

¹³ The *Farmland Dairies* decision made clear that the impact of the New York system was not, as the Massachusetts Supreme Court misperceived, see Pet. App. A12 n.14, to favor the purchase of New York milk, but rather to equalize the minimum cost of New York and out-of-state milk by applying the same minimum price to both. The New York regulation "establish[ed] a minimum price of \$13.85 per hundredweight for New York-produced Class I fluid milk," and provided that "all milk produced outside New York State and distributed within the State as Class I fluid milk shall be subject to the application of a compensatory payment as the Commissioner determines necessary to *equalize cost for such milk* among licensed milk dealers." 789 F. Supp. at 1247 (emphasis added)

For example, suppose the federal minimum price for Class I milk is \$14/cwt, and out-of-state farmers are willing to sell milk at a negotiated premium of \$.50/cwt over the federal minimum price. Absent the Massachusetts Order, processors have an economic incentive to buy milk at the lowest price available. If Massachusetts dairy farmers cannot meet the \$14.50 price, processors will make additional purchases of milk from out-of-state farmers. Under the Pricing Order, however, processors must pay \$15/cwt for out-of-state milk (the federal minimum price of \$14 plus a Massachusetts premium of \$1, assuming a federal "blend" price of \$12/cwt). The Order is invalid under the Commerce Clause because it "remove[s] any economic incentive for a local distributor to purchase out-of-state milk." *Polar Co. v. Andrews*, 375 U.S. at 376. Indeed, the Order denies out-of-state milk "an equal opportunity to compete with [in-state] milk to the extent that the out-of-state supply [bears] additional transportation charges." *Id.*

For these reasons, the Massachusetts Supreme Judicial Court was flatly wrong in concluding that "[t]he pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin." Pet. App. A10. In support of that conclusion, the court observed (Pet. App. A10) that the Massachusetts premium is determined by (1) the Massachusetts target price, (2) the federal minimum price, and (3) the amount of milk sold for consumption in Massachusetts. The court's conclusion is a *non sequitur*. Although the Massachusetts premium is determined by a formula that does not refer to the actual price paid for out-of-state milk, the fact remains that the Order requires processors to pay the federal minimum price plus the Massachusetts premium

(citation omitted). The New York system thus did precisely what the Massachusetts Pricing Order does: establish a minimum price equally applicable to in-state and out-of-state milk.

for out-of-state milk. Processors are free to pay more; they cannot pay less.

The court also observed that the Massachusetts premium is "independent of the price the milk dealer has paid for the milk or the milk's point of origin," and therefore "does not manifest any preference for in-State milk over out-of-State milk." Pet. App. A10. Again, the court's conclusion does not follow from its premises. A uniform minimum price is still a minimum price, and *Baldwin* established that state laws setting uniform minimum prices are invalid under the Commerce Clause regardless of whether they establish a "preference" for in-state milk.¹⁴

B. The Massachusetts Pricing Order Is Invalid Because It Facially Discriminates Against Interstate Commerce

The Massachusetts Pricing Order violates the Commerce Clause for an additional reason that was not present in *Baldwin*. Under the New York law at issue in *Baldwin*,

¹⁴ The Massachusetts court did not rely on *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and that case provides no support for respondent. *Henneford*, decided two years after *Baldwin*, upheld the validity of a use tax imposed by the State of Washington on goods purchased in other States. Justice Cardozo, who wrote the Court's opinion in both cases, noted that the cases were "far apart." 300 U.S. at 585. In *Henneford*, the State merely eliminated an advantage that accrued to out-of-state sellers because in-state sellers were subject to a state-imposed sales tax. Out-of-state sellers retained whatever competitive advantages they might have had as a result of greater efficiency. But in *Baldwin*—as in this case—the State established a minimum price that eliminated all price differences, including differences resulting from the greater efficiency of out-of-state farmers. See Regan, *supra* note 7, at 1245-57. In addition, the proceeds of the tax in *Henneford* raised revenue for the State. In *Baldwin*—as in this case—the difference between the market price and the State-imposed price does not go into the State treasury, but instead goes directly to dairy farmers. (Indeed, this case is worse than *Baldwin* because the differential goes only to *in-state* farmers.)

out-of-state farmers received the difference between the New York minimum price and the price they would have received in the absence of the New York law. In contrast, the Massachusetts Order requires processors to pay a premium for both out-of-state milk and in-state milk, but distributes the premium only to in-state dairy farmers. The Massachusetts Order thus does more than simply "level the playing field." *Marigold*, 809 F. Supp. at 722. It provides a direct commercial advantage to Massachusetts farmers, and explicitly deprives out-of-state farmers of payments from the Fund simply because they are located in other States. The Pricing Order thus on its face "violate[s] the cardinal requirement of non-discrimination." *Limbach*, 486 U.S. at 274.¹⁵

Because the premium is distributed only to Massachusetts farmers, the Massachusetts Pricing Order is similar to a state tax levied on interstate sales but not on intrastate sales. See *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) ("State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State"). Indeed, it is even worse, because Massachusetts farmers receive the proceeds from the Massachusetts premium on interstate sales. In

¹⁵ Petitioners plainly have standing to challenge the distribution of the Massachusetts premium only to in-state farmers. First, petitioners are required to pay the premium. In analogous circumstances, the Court held that wholesalers who paid a liquor tax had standing to challenge the tax despite the State's argument that they had not shown any economic injury. See *Bacchus Imports*, 468 U.S. at 267. Second, petitioners purchase 97% of their milk from out-of-state dairy farmers. Pet. 4. If out-of-state farmers were eligible to receive the Massachusetts premium, they could afford to charge petitioners less for milk. Consequently, the distribution of premiums only to in-state farmers causes petitioners to pay more for out-of-state milk. As a result: (1) petitioners have suffered a concrete and particularized injury in fact; (2) there is a causal connection between the injury (higher prices) and the petitioners would be redressed by a favorable decision. See *Lujan* discriminatory nature of the payments, and (3) the injury to *v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

effect, Massachusetts farmers share in the proceeds of all sales by their out-of-state competitors.

Again, an example is helpful. Suppose the federal Class I minimum price is \$14/cwt, the federal blend price is \$12, and processors are paying dairy farmers a negotiated premium of \$.50/cwt in the absence of the Massachusetts Order. Under the Federal Milk Marketing Order System, Class I processors will pay \$14.50/cwt (the \$14 federal minimum price plus the \$.50 negotiated premium) for both in-state and out-of-state milk; both in-state and out-of-state farmers will receive \$12.50/cwt (the \$12 federal blend price plus the \$.50 negotiated premium). As a result of the Massachusetts Order, (1) Class I processors will be required to pay at least \$15/cwt (\$14/cwt plus a \$1/cwt Massachusetts premium), and (2) in-state farmers will receive at least \$15 (the \$12 federal blend price plus a \$3 distribution under the Massachusetts Order).¹⁶ Because out-of-state farmers receive nothing from the Massachusetts Fund, they would have to *negotiate* a premium of \$3/cwt in order to match the in-state farmer's minimum total compensation of \$15/cwt. But in that case, the price to the processor for out-of-state milk would be \$18/cwt (\$14 federal minimum price plus \$1 Massachusetts premium plus \$3 negotiated premium)—far above the \$15 price to the processor for in-state milk. And an out-of-state farmer who meets the \$15 price will receive only \$12/cwt (the federal blend price), far less than the \$15 his in-state competitor receives. The Massachusetts Order thus discriminates against out-of-state dairy farmers in favor of in-state farmers.

The Massachusetts Order cannot be justified as a constitutionally permissible "subsidy" to Massachusetts dairy

¹⁶ See note 4 *supra* (explaining why a Massachusetts premium of \$1/cwt results in a distribution of roughly \$3/cwt to Massachusetts farmers).

farmers.¹⁷ It is true that “[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause].” *Limbach*, 486 U.S. at 278. That is so because States generally may “limit[] benefits generated by a state program to those who fund the state treasury.” *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980). But the Massachusetts premium is far from a “subsidy”—i.e., “a grant of funds or property from a government . . . to a private person or company . . . as a simple gift or a payment of an amount in excess of the usual charges for a service” Webster’s Third New International Dictionary 2279 (1968). Massachusetts has not appropriated funds from its treasury as a “simple gift or payment” to its farmers. Instead, it has ordered milk processors to remit funds, based on their purchases of milk, for distribution to in-state farmers. The Pricing Order thus regulates interstate commerce by setting a minimum price for out-of-state milk and diverting part of the proceeds of sales of out-of-state milk to in-state farmers. Under the Commerce Clause, a State may not pursue the legitimate goal of encouraging domestic industry by “the illegitimate means of isolating the State from the national economy.” *Philadelphia v. New Jersey*, 437 U.S. at 627.¹⁸

¹⁷ The Massachusetts court did not discuss or rely on this argument. A federal district court erroneously relied on it in sustaining the constitutionality of a somewhat different law in Maine. See *Cumberland Farms, Inc. v. Lafaver*, Civ. No. 92-70-P-H (D. Me. Aug. 3, 1993). In any event, the Maine law differs from the Massachusetts Order in that it regulates the retail price of milk. In addition, no Federal Order applies to milk sales in Maine, and the *Cumberland Farms* court concluded that the minimum price for out-of-state milk is lower than the minimum price for milk produced in Maine.

¹⁸ In *Limbach*, the Court struck down as violative of the Commerce Clause an Ohio law that awarded a tax credit against the Ohio motor vehicle fuel sales tax for ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a State granting similar tax advantages to ethanol produced in Ohio. The Court acknowledged that Ohio probably could have provided a direct

Similarly, the “market participant doctrine” plainly has no application here. Under that doctrine, when a State chooses to engage in commercial activity, its business methods are of no concern under the Commerce Clause even if they favor the State’s residents. See *Reeves*, 447 U.S. at 438-39; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976). The Court has rejected the contention that any state program that has the purpose and effect of supporting state industry is “a form of state participation in the free market.” *Limbach*, 486 U.S. at 277. The Pricing Order is a typical form of government regulation of business. In this case, as in *Limbach*, the State’s role “cannot plausibly be analogized to the activity of a private purchaser.” *Id.* at 278.

C. The Massachusetts Pricing Order Is Invalid Under the Balancing Analysis of *Pike v. Bruce Church*

The Massachusetts Supreme Judicial Court incorrectly concluded that the Pricing Order is subject to the balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we have explained, see pp. 12-25 *supra*, the Massachusetts Order is nakedly protectionist in purpose and effect, and therefore is subject to much stricter scrutiny. In any event, the Order is invalid even under the *Pike* analysis.

The *Pike* analysis turns on “the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” 397 U.S. at 142. The local interest in this case is protection of the Massachusetts dairy industry. Massachusetts does not even assert that it is advancing a noneconomic interest such as the health or safety of its citizens, see *Mintz*

subsidy to its own ethanol producers—as, indeed, did Indiana, where the ethanol producer challenging the Ohio law was located. 486 U.S. at 278. But a State’s ability directly to subsidize its residents did not justify the Ohio statute, which attempted to achieve its goals through improper regulation of interstate commerce. *Id.*

v. *Baldwin*, 289 U.S. 346 (1933), environmental protection, see *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), or the prevention of fraud, see *California v. Thompson*, 313 U.S. 109 (1941). Instead, the State acknowledges that it is seeking to advance local economic interests by insulating Massachusetts farmers from price competition with out-of-state farmers. "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose." *Maine v. Taylor*, 477 U.S. 131, 148 (1986).¹⁹

Even when a State enacts a law pursuant to its "unquestioned power[s]," the law is invalid under the *Pike* balancing test if "adequate and less burdensome alternatives exist." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976). The Massachusetts Pricing Order plainly fails that test. The State's interest in protecting its dairy industry could be promoted as effectively through a variety of actions that would not harm interstate commerce as severely as the Pricing Order. For example, the State could subsidize its dairy farmers out of its general revenues. Or it could grant relief from state income taxes or local property taxes to in-state dairy farmers. Beyond that, the State could arrange direct or guaranteed loans to dairy farmers to provide capital for investments that would increase the productivity of Massachusetts dairy farmers. In view of the options available to Massachusetts, the burden on interstate commerce that results from its decision to insulate Massachusetts dairy farmers from competition exceeds the benefit to the local dairy industry.

¹⁹ Even if the State had asserted a noneconomic interest, this Court would not necessarily have accepted that assertion at face value. It is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). And "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

STEVEN J. ROSENBAUM *
ROBERT A. LONG, JR.
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

November 16, 1993

* Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF THE ARGUMENT	4
ARGUMENT:	6
I. THE MASSACHUSETTS STATUTE, WHICH COMBINES THE VALID SUBSIDIZATION OF IN-STATE INDUSTRY WITH THE EVEN- HANDED COLLECTION OF DEALER FEES FROM DEALERS SELLING MILK WITHIN THE STATE, IS FULLY CONSISTENT WITH THE COMMERCE CLAUSE	6
A. A State's Subsidization of an In-State Industry Does Not Violate the Commerce Clause	6
B. The Collection of a Fee for Milk Handled for Sale Within the State is a Valid Exercise of State Governance Which Does Not Interfere With or Dis- criminate Against Interstate Commerce	10

TABLE OF CONTENTS - Continued

	<u>PAGE</u>
C. The Price Order is Not Rendered Unconstitutional By Virtue of the Fact that Its Two Components, Each of Which is Valid Under the Commerce Clause, Work Together To Achieve the Legitimate State, Purpose of Assisting the State's Dairy Industry	13
1. Massachusetts' Order Was Adopted in Furtherance of a Substantial Legitimate State Interest and Provides Significant Local Benefits.	13
2. The Massachusetts Order Furthers the Legitimate Purpose of Preserving Its Dairy Industry In a Manner Completely Consistent With the Commerce Clause	16
II. UNDER PIKE BALANCING, THE LEGITIMATE GOVERNMENTAL INTERESTS ADVANCED BY THE MASSACHUSETTS ORDER OUTWEIGH THE INCIDENTAL EFFECT UPON INTERSTATE COMMERCE	18
CONCLUSION	21

TABLE OF AUTHORITIES

	<u>PAGE</u>
I. Cases	
<u>Bacchus Imports, Ltd. v. Dias</u> , 468 <u>U.S.</u> 263, 271 (1984)	5, 6, 16
<u>Baldwin v. G.A.F. Seelig, Inc.</u> , 294 <u>U.S.</u> 511 (1935)	15, 16
<u>City of Philadelphia v. New Jersey</u> , 437 <u>U.S.</u> 617, 624 (1988)	19
<u>Cumberland Farms, Inc. v. LaFaver</u> , ____ <u>F. Supp.</u> ____ (D. Me. Aug. 3, 1993) (No. 93-2066)	5
<u>Guy v. Baltimore</u> , 100 <u>U.S.</u> 434, 443 (1980), 601 <u>A.2d</u> 610, 617-19 (Me. 1991)	5
<u>Halliburton Oil Well Co. v. Reily</u> , 373 <u>U.S.</u> 64 (1963)	12
<u>Henneford v. Silas Mason Co.</u> , 300 <u>U.S.</u> 577, 586 (1937)	8, 12, 15
<u>Hughes v. Alexandria Scrap Corp.</u> , 426 <u>U.S.</u> 794 (1976)	7, 10, 18
<u>H.P. Hood & Sons, Inc. v. DuMond</u> , 336 <u>U.S.</u> 525, 529 (1949)	13
<u>Milk Control Board v. Eisenberg</u> <u>Farm Products</u> , 306 <u>U.S.</u> 346 (1939)	12, 13, 17

TABLE OF AUTHORITIES - Continued

	<u>PAGE</u>
<u>Nebbia v. New York</u> , 291 <u>U.S.</u> 502 (1934)	13, 19
<u>New Energy Co. v. Limbach</u> , 486 <u>U.S.</u> 269, 273-274, 278 (1988)	5, 6, 10, 19
<u>Opinion of the Justices</u> , 601 <u>A.2d</u> 610, 617-19 (Me. 1991)	5
<u>Pike v. Bruce Church, Inc.</u> , 397 <u>U.S.</u> 137 (1970)	5, 18, 20
<u>Polar Ice Cream & Creamery</u> <u>Co. v. Andrews</u> , 375 <u>U.S.</u> 378, 381-82 (1964)	12
<u>Reeves, Inc. v. Stake</u> , 447 <u>U.S.</u> 429 (1980)	10

II. STATUTES

<u>Vt. Stat. Ann. Tit. 6, §2924</u> (West Supp. 1993)	11
<u>Me. Rev. Stat. Ann. Tit. 36 §4541</u> (West Supp. 1992)	11

No. 93-141

In the

Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. and
LECOMTE DAIRY, INC.,

Petitioner,

v.

JONATHAN HEALY, Commissioner of
Massachusetts Department of Food and Agriculture,
Respondent.

On Writ of Certiorari to the
Massachusetts Supreme Judicial Court

Brief of the State of New Jersey As Amicus
Curiae in Support of the Respondent

INTEREST OF AMICUS CURIAE

This case involves the ability of State governments to regulate all aspects of the dairy industry in order to ensure the maintenance of a fresh, wholesome supply of sanitary milk for the consumers of their respective States. The State of New Jersey has long maintained an aggressive milk control program for the benefit of producers, the State's consumers and dealers.

In addition, New Jersey has experienced a similar crisis regarding the failure of the Federal Milk Marketing Orders to provide a reasonable return to its dairy farmers. As a

result the number of New Jersey dairy farms have been significantly reduced.

New Jersey believes that support systems for dairy farmers, such as the one Massachusetts has enacted, are vital options to maintaining a healthy dairy industry. This is necessary to assure not only an adequate supply of milk to New Jersey consumers, but to provide many attendant benefits such as the maintenance of the agricultural services industry and taxpaying open space. Such goals are especially important in New Jersey the country's most densely populated state. Through its experience in milk regulation, New Jersey is uniquely qualified to discuss the importance of maintaining dairy producers to the health of the State's overall dairy industry.

In a broader context, New Jersey supports the ability of states to utilize two important tools for governing -- (1) the payment of subsidies to domestic industries and (2) the even-handed collection of fees for events occurring within its borders. The provision of subsidies funded through special purpose fees and taxes should be an option available to state governments to carry out their legitimate functions.

STATEMENT OF THE CASE

The Commissioner of the Massachusetts Department of Food and Agriculture issued a "Pricing Order" (J.A. 32-43¹) upon finding that the State's milk production industry was in a state of emergency and was predicted, in the absence of immediate price stabilization, to lose, "over one-third of its remaining dairy farms over the next year," (J.A. 28). The Governor's Special Commission found that this crisis would threaten both the supply of fresh milk to Massachusetts consumers as well as the open farm lands

¹ The term "J.A." refers to Joint Appendix.

currently "used as wildlife refuges, for recreation, hunting, fishing, tourism, and education". (J.A. 13).

This "Pricing Order" did not actually set milk prices in Massachusetts or elsewhere, but instead established a subsidy system to increase the amount of income that Massachusetts milk producers would receive for their milk. The Order set a "target price" to be used in determining the amount of the subsidy that Massachusetts milk producers were to receive. The "target price" represented the amount that efficient dairy farmers in Massachusetts would require per hundred pounds of milk (hundredweight) in order to remain viable. (J.A. 32.) Therefore, it provided a benchmark for use in apportioning subsidy money to them. To receive the equivalent of the "target price" for each hundredweight of milk produced, milk producers would have to receive subsidy premiums equal to the difference between that "target price" and the federally mandated "blend price" for the area.²

The subsidies are paid to Massachusetts dairy farmers from a special purpose fund, the Dairy Equalization Fund. Each month, each Massachusetts milk producer receives a pro rata share of the money in the Equalization Fund based on the amount of milk produced (up to a maximum of two hundred thousand pounds). If there is not enough money in the Dairy Equalization Fund in a given month to give each Massachusetts dairy farmer this maximum amount, then the dairy farmer only receives its pro rata share of the money in the fund. If there is money left in the fund after all Massachusetts dairy farmers receive the full distribution for the milk they produce, it is divided among all milk dealers in proportion to their Fund contributions. (J.A. 36-38).

²For convenience, amicus refer to that difference as the "target premium."

Massachusetts funds its Dairy Equalization Fund through fees imposed on all Massachusetts milk dealers selling milk for consumption in Massachusetts. The amount of the fee is equal to one-third of the "target premium" per hundredweight; the same fee is paid by all such dealers, regardless of the origin of their milk or the price that they paid for it. No fees are collected from out-of-state milk producers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners' arguments turn on their characterization of the Massachusetts Order as one involving the extraterritorial setting of milk prices, (*See, e.g.*, Pet. Br. 12, 16, 26) or the impermissible appropriation of out-of-state money for the benefit of in-state dairy farmers. (*See* Pet. Br. 11, 12, 16, 30-31). However, a fair reading of the Massachusetts Pricing Order demonstrates that it does not set milk prices either inside or outside Massachusetts, nor does it funnel out-of-state money to in-state dairy farmers.

Instead, the Order achieves the entirely permissible goal of preserving a valued local industry through the use of two time-honored mainstays of state governance -- (1) the payment of subsidies to those within the State who are engaged in a particular industry; and (2) the evenhanded collection of fees for events occurring within its borders. These two legitimate, longstanding state powers are not rendered unconstitutional when used in concert to achieve a permissible purpose simply because that same purpose could also have been pursued through constitutionally impermissible means (such as extraterritorial price-fixing or the erection of trade barriers).

It is well established that States may, consistent with the Commerce Clause, subsidize their own domestic industries. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]

prohibition[.]" *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). In addition, the evenhanded collection of fees for events occurring within State borders does not violate the Commerce Clause. Therefore these two permissible governmental functions are not rendered impermissible when they are used in concert to achieve a legitimate state purpose.

The Order's subsidy program represents a permissible means for Massachusetts to "encourag[e] domestic industry," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984), because the Order does not seek to "build up [Massachusetts'] domestic commerce by means of unequal and oppressive burdens on the industry and business of other states." *Id.* at 272 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1980)). *See Opinion of the Justices*, 601 A.2d 610, 617-19 (Me. 1991) (upholding constitutionality of similar subsidy program for Maine dairy farmers); *Cumberland Farms, Inc. v. LaFaver*, ___ F. Supp. ___ (D. Me. Aug. 3, 1993) (No. 93-2066).

Since the Massachusetts Order involves subsidies, no Commerce Clause analysis is required. However, if the Court determines that the Massachusetts milk pricing subsidy is subject to Commerce Clause analysis, the appropriate standard by which to evaluate the validity of the Massachusetts law is that set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this standard, where a local enactment operates evenhandedly to effectuate a valid local public interest and its effects upon interstate commerce are merely incidental, the local enactment will be upheld unless the burden imposed upon interstate commerce is found clearly excessive in relation to the local interest advanced. *Id.* at 142.

Any burden on interstate commerce is indirect. The Massachusetts law is applied evenhandedly to in-state and out-of-state milk dealers.

The local benefits furthered by such laws far outweigh any indirect burden on interstate commerce. The maintenance of local farmers is essential to ensuring an adequate supply of milk to consumers. Milk is a unique, highly perishable commodity whose supply levels fluctuate. It is important to maintain a stable local milk supply in periods of excess milk supply in order to ensure adequate supplies during periods of shortages.

ARGUMENT

- I. The Massachusetts Statute, Which Combines the Valid Subsidization of In-State Industry With the Evenhanded Collection of Dealer Fees From Dealers Selling Milk Within the State, Is Completely Consistent With the Commerce Clause.
 - A. A State's Subsidization of an In-State Industry Does Not Violate the Commerce Clause.

As this Court observed in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984), "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging local industry." Moreover, a State may, consistent with the Commerce Clause, provide that encouragement to local industry in the form of a direct subsidy. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition[.]" New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988). State subsidies for local industries are generally lawful because "[t]he Commerce Clause does not prohibit all state action designed to give its residents an

advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Id. (emphasis in original). Thus, the Commerce Clause does not prohibit a state from providing direct support for its local industry as long as that support is not accompanied by regulatory measures which burden or restrict the flow of interstate commerce.

Indeed, petitioners apparently concede that a direct subsidy from general revenues to Massachusetts dairy farmers would pass constitutional muster. (See Pet. Br. 32 & n.27 (suggesting that "the state could provide dairy farmers with tax subsidies from the Commonwealth's general tax fund," and that "such subsidy programs are presumed to be valid."); (Id. at 29).

Petitioners strenuously argue, however, that the Massachusetts pricing order is not a subsidy, (See Pet. Br. at 13, 28-31), placing great weight on the fact that the word "subsidy" does not appear in the Commissioner's Order. (Id. at 13, 30). But a measure's validity cannot be determined by semantics; it is the substance of the measure that must be scrutinized under the Commerce Clause. When that exercise is undertaken, it becomes quite obvious that the Massachusetts Order is a subsidy. State funds are channeled to those Massachusetts farmers engaged the milk production. In a manner analogous to the State's action in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), Massachusetts is spending its own, legitimately obtained money to "purchase" something it values: the viability of its farmers and the State's entire dairy industry and the resulting aesthetic and community benefits. See Hughes v. Alexandria Scrap, 426 U.S. at 809, 810.

The repeated efforts of petitioners to characterize the Order, not as a subsidy, but as "price-fixing," are unpersuasive when the actual manner in which the Order operates is examined. As this Court has admonished, such

"catch words and labels . . . are subject to the dangers that lurk in metaphors and symbols." Henneford v. Silas Mason Co., 300 U.S. 577, 586 (1937). It is inaccurate to characterize the Order as price-fixing, when milk prices are not set, either in Massachusetts or outside the State. The Order does not impose changes of any kind on the milk prices that are paid by dealers to producers. Dealers have every incentive to buy milk as cheaply as possible, from whatever source. The fact that price-setting could have been used to achieve the same effect of fostering a domestic industry does not mean that Massachusetts Order is a form of price-setting. (See Part C., below).

Indeed, the premise for petitioners' price-setting analogies -- that Massachusetts, having set prices for its own milk, has extended those same prices extraterritorially in order to avoid competitive undercutting -- collapses upon closer scrutiny. The "target price" which Massachusetts dairy farmers receive for their milk has clearly not, even under petitioners' erroneous assumptions, been imposed upon dealers, since the dealer's fee would only be enough to cover one-third of the distance between the federal minimum and the "target price." The "target price" serves not as the foundation of an extraterritorial price-setting scheme, but only as a benchmark for distributing domestic subsidies. The dealer fees are fully legitimate fees which the government is entitled to collect and use as a funding source. (See Part B, below).

Petitioners also argue that the fact that the money flows from a special purpose fund, rather than from general revenues, keeps it from being a permissible subsidy. (Pet. BR. 28). But where, as here, the collection of money into the special purpose fee is a valid exercise of state authority over transactions taking place within its boundaries (See Part B, below), there is no constitutionally cognizable basis for drawing a distinction based on revenue source.

The distinction which petitioners attempt to draw between the revenue sources is based on the erroneous factual premise that the Dairy Equalization Fund is primarily financed by out-of-state producers. (See Pet. Br. 32 n. 27) (distinguishing subsidy programs drawn from general revenues from the pricing order at issue here on the grounds that the former "would be using Massachusetts funds derived from Massachusetts residents" and "would afford Massachusetts legislators and voters a direct say in whether to support a particular state industry with state tax dollars"). But the dealer fees are not drawn from nonresident producers, as petitioners imply; instead, they are paid by Massachusetts milk dealers who either absorb the loss themselves or pass it on to Massachusetts consumers. (J.A. 58-59). The record in this case clearly indicates that the two parties upon which the incidence of the fee falls -- Massachusetts dealers and Massachusetts consumers -- were quite involved in the process of developing the Order. (J.A. 26-27).

Reduced to its essence, the argument of petitioners concerning the effects of the Pricing Order on interstate commerce amounts to an assertion that the Order must be invalidated as discriminatory because it does not provide equivalent subsidies to all out-of-state dairy farmers who compete with the recipients of the subsidy in Massachusetts. See e.g., J.A. 59 (Comments of Mr. Altman from Record of Proceedings Before the Commissioner) ("Massachusetts farmers are getting \$15 [per hundredweight whereas New York and Vermont farmers are not[.])").

But the Commerce Clause is not violated simply because the State does not extend a subsidy to all those outside of the State who compete in the same industry. On the contrary, the Court has indicated that such "rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural

improvement and business development programs reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State." Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

The negative economic effects of which petitioners complain are not unique to subsidies drawn from special purpose funds; they are the inevitable result of any subsidy program which succeeds in improving the competitive position of domestic industry vis-a-vis its out-of-state competitors. As a consequence, under petitioners' analysis no state subsidy program could survive unless it were made available to all potential out-of-state competitors of in-state recipients. Such a radical infringement of state authority finds no support in the dormant Commerce Clause. Since the beginning of our nation, the States have "experiment[ed] with different methods of encouraging local industry," and the Court has never construed the Commerce Clause as requiring a state to "subsidize out-of-state business." Alexandria Scrap, 426 U.S. at 816 (Stevens, J., concurring).³ On the contrary, the Court recently reaffirmed in Limbach that "[d]irect subsidization of domestic industry does not ordinarily run afoul of" the Commerce Clause. Limbach, 486 U.S. at 278.

B. The Collection of a Fee for All Milk Handled For Sale Within the State Is a Valid Exercise of State Governance Which Does Not Interfere With or Discriminate Against Interstate Commerce.

Petitioners' argument is premised on the assertion that the dealer fees assessed on all milk dealers selling milk for

³ See Id. at 816-17 (noting the absence of any Commerce Clause challenge to a state subsidy program prior to Alexandria Scrap); Id. at 805, 807 (majority opinion) (same).

consumption in Massachusetts are a thinly veiled vehicle for drawing money away from out-of-state milk producers and passing it onto in-state milk producers. (Pet. B. p.24). This premise is supported neither by the facts nor by economics. The assessment placed on dealers within the State instead serves primarily to burden some state residents (milk dealers and milk consumers) for the benefit of other state residents (dairy farmers). This has been the intent of the law from the outset. (J.A. 17-18, 22-23).

The factual findings below indicate that this intention has been realized. That dealer fees are a recognized way of reassigning in-state benefits and burdens is demonstrated by the fact that both of the New England "export states" identified by petitioner (Maine and Vermont) (J.A. 16-17), have adopted legislation similar to Massachusetts' which provides for the distribution to in-state milk producers of fees assessed on all milk dealers selling within the State. See Vt. Stat. Ann. Tit. 6 §2924 (West Supp. 1993), Me. Rev. Stat. Ann. Tit. 36 §4541 (West 1992).

Hence, contrary to petitioners' assertions, the Order is not a conduit channeling out-of-state money into the pockets of in-state dairy farmers; instead, it is a nondiscriminatory measure designed to reallocate State resources. The Order treats all in-state and out-of-state dealers alike: all of them must pay premiums based on their sales of milk to in-state customers, and none of them are required to pay premiums on their sales of milk to out-of-state customers. No provision of the Order discriminates against out-of-state dealers or interferes with the interstate transportation of milk. The Order does not restrict the flow of milk into or out of Massachusetts, nor does it tax the interstate shipment of milk or any out-of-state purchases or sales of milk. The Order also does not restrict the ability of in-state or out-of-state dealers to buy milk from out-of-state producers at whatever price such producers may charge.

Under the Order, all in-state and out-of-state dealers selling milk in Massachusetts must pay the same premium on local sales of milk, resulting in "equal treatment for in-state and out-of-state [dealers] similarly situated..." Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 70 (1963). "The stranger from afar is subject to no greater burdens . . . than the dweller within the gates." Heeneford, 300 U.S. at 584.

The Order's requirement of monthly premium payments by all milk dealers on their in-state sales is precisely the kind of evenhanded regulation of local transactions in milk that this Court has previously upheld. In Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939), for example, the Court upheld minimum milk prices imposed upon all milk dealers buying milk within the state of Pennsylvania, even though the ultimate destination of some of the milk was out of state. In that case, the Court reasoned that "the uniform operation of the statute locally would be crippled and might be impracticable" if milk dealers could "ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state." Id. at 353. Likewise, in this case, Massachusetts is imposing a fee on all dealers who seek to sell their milk in Massachusetts. Such a scheme could not operate in a uniform and workable manner if dealers could ignore the fee to the extent that some portion of their milk hailed from out of state. See also Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 378, 381-82 (1964) (upholding "that provision in the Florida Milk Control Act which imposes a tax in the amount of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor.")

While it may be the case that the payment of dealer fees, coupled with the improved competitive position of Massachusetts dairy farmers, has some impact on milk producers in other states, that effect is only an incidental

one. The fact that some incidental burden results from a State's valid regulatory action is not fatal under the Commerce Clause; indeed, any regulatory action will have some such impact. As the analysis in Part C demonstrates, however, any such incidental impact is not of constitutional stature. "Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly burdens interstate commerce." Eisenberg, 306 U.S. at 351.

C. The Price Order Is Not Rendered Unconstitutional By Virtue of the Fact That Its Two Components, Each of Which Is Valid Under the Commerce Clause, Work Together To Achieve the Legitimate State Purpose of Assisting the State's Dairy Industry.

1. Massachusetts' Order Was Adopted in Furtherance of a Substantial, Legitimate State Interest and Provides Significant Local Benefits.

Ever since Nebbia v. New York, 291 U.S. 502 (1934), this Court has recognized that states have a legitimate interest in regulating the milk industry to prevent conditions that would "cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself." Id. at 538. In H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 529 (1949), the Court pronounced:

Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests

has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this Court as within the powers of the State over its internal commerce as against the claim that they violated the Fourteenth Amendment [Footnote and citation omitted.]

In this case, the Massachusetts Commissioner concluded, after extensive public hearings, that "an emergency of unprecedented proportions" existed within the Massachusetts dairy industry and could be remedied only by adopting the subsidy program contained in the Order. (J.A. 30-31) The Commissioner determined that, unless Massachusetts dairy farmers received a larger payment for their milk than the minimum price provided by federal regulations, many local farmers would fail and an industry critical to the state's economy would face economic ruin. The Commissioner also found that, by supporting local dairy farmers, the Order would result in assuring "a local supply of fresh milk for consumers". (J.A. 32).

Thus, the purpose of the Order, which is designed to provide important local benefits, is legitimate. The subsidy program established is clearly necessary to avert a systemic failure within the Massachusetts dairy industry. Nearly half of the dairy farms in Massachusetts failed between 1980 and 1991. Likewise, New Jersey has suffered a substantial reduction in the number of its dairy farms. The record

clearly established that the average cost of production of Massachusetts dairy farmers substantially exceeded the amounts they received for their milk. (J.A. 27-28) In these circumstances, the Massachusetts Commissioner was entitled to provide a subsidy in order to "save an industry from collapse." (J.A. 128)

Petitioners' assertion that the true purpose of the Massachusetts Order is to isolate Massachusetts milk producers from competition, (See Pet. Br. 19-21 & n.20) is inaccurate. While it is true that the Order was designed to bolster Massachusetts dairy farmers and thereby make them better able to compete with other states, this was not done by projecting competitive restraints into other states. Instead, in the manner of all subsidies, Massachusetts improved the competitive posture of its own dairy farmers.

Petitioners' only argument about the purportedly anticompetitive effects of the Order can be made only by first drawing a faulty analogy between the Order and the actual setting of milk prices. Petitioners speculate about the action Massachusetts would have taken in response to competitive forces. If Massachusetts had assisted its farmers by setting Massachusetts milk prices, petitioners' argue, it would then be forced to respond to lower prices in other States by imposing its own higher milk prices upon milk produced out-of-state, as was done in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). (See Pet. Br. at 23-25). But the premise for this line of argument is false; Massachusetts did not choose to set milk prices and was not, therefore, faced with the competitive dilemma described by petitioners. Massachusetts is merely engaged in utilizing its own funds to assist a flagging industry.⁴

⁴Even if Massachusetts were shown to be motivated by a desire to achieve the same result as could be attained through such price fixing, this would not make its otherwise valid exercise of state authority improper. See Henneford, 300 U.S. at 586 (rejecting argument that motives, which "cause[d] [a use tax] to be stigmatized as equivalent to a protective tariff,"

2. **The Massachusetts Order Furthers
The Legitimate Purpose of
Preserving Its Dairy Industry In A
Manner Completely Consistent
With the Commerce Clause.**

Petitioners attempt to draw a negative inference from the fact that the Massachusetts Order was motivated by a desire to achieve the result of promoting the Massachusetts dairy industry. Petitioners attempt to equate the Massachusetts Order with the extraterritorial price-fixing scheme that was struck down in Baldwin simply because the measures share a common goal of fostering a State's dairy industry.

Yet, as the Court made clear in Bacchus, the goal of fostering local industry does not itself run afoul of the constitution, although the specific means chosen to attain that goal may do so:

No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. [Bacchus, 468 U.S. at 271 (emphasis added).]

Here the means chosen do not have the negative impact on interstate commerce that was presented with the price-setting scheme in Baldwin. The Massachusetts Order does

could invalidated it, noting that "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful.").

not seek to "project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," nor does it do the functional equivalent by placing barriers on the sale of milk that failed to sell for a minimum price. Instead, Massachusetts chose to use its own money, lawfully collected through a special fee program, to subsidize a valued industry.

While it is undoubtedly true that the Massachusetts Order, like "[e]very state police statute[,] necessarily will affect interstate commerce in some degree," it "does not run counter to the grant of Congressional power merely because it incidentally or indirectly burdens interstate commerce." Eisenberg, 306 U.S. at 351. Petitioner has produced no evidence to show that the Order imposes an undue burden on interstate commerce, apart from its conclusory assertion that the subsidy program will encourage more milk production by local farmers and thereby cause less out-of-state milk to be imported into Massachusetts. Contrary to this claim, the Commissioner specifically found that the Order (i) had no adverse effect on prices received by out-of-state producers, and (ii) was followed by a decrease in production by Massachusetts dairy farmers. (J.A. 88-89). Thus, there is no indication that the Order has imposed a significant adverse burden on interstate commerce.

Finally, the suggestion of petitioners that some alternative means less burdensome to interstate commerce should have been used by Massachusetts is without merit. Among their suggested alternatives is the use of a direct subsidy from general revenues to Massachusetts milk producers. But they do not explain how altering the source of the subsidy would remove any burden on interstate commerce. Although petitioners have repeatedly intimated that the dealer fees somehow draw money from out-of-state milk producers, they have never explained how this happens, nor have they rebutted the record findings to the contrary.

Petitioners have seized upon a fact having no real bearing on Commerce Clause analysis -- that some of the dealers who fund the subsidy in question are dealing in milk that originated in another state -- as a way of attacking completely legitimate subsidies to prevent the collapse of Massachusetts dairy farming. Since the Commerce Clause provides no reason for drawing a distinction between subsidies funded through general revenues and subsidies funded through special purpose fees and taxes, there is no constitutional basis for arbitrarily limiting the range of legislative choices available to States in carrying out their legitimate governmental functions. It may be that the voting public, upon whom the primary incidence of the fee falls, prefers such a special purpose fund on the grounds that it offers greater governmental accountability and provides them with a clearer picture of the purposes to which their increased milk prices are put.

Petitioners would deprive a State's voters of this option, forcing them to subsidize their dairy industry through general revenues or not at all. The Commerce Clause does not require such limits on a State's legislative options. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 817 (1976)-(Stevens, J., concurring) (the Commerce Clause is "primarily intended . . . to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business").

II. Under Pike Balancing, the Legitimate Governmental Interests Advanced by the Massachusetts Order Outweigh the Incidental Effect Upon Interstate Commerce.

This Court has consistently held that the level of scrutiny that a court must give to a local law challenged under the Commerce Clause depends upon whether it patently discriminates against interstate commerce or is merely burdensome. See New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-274 (1988); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1988). When patent discrimination is involved, the regulation will be subjected to heightened scrutiny and a "virtually per se rule of invalidity" will be applied. Id. However, when a regulation serves a legitimate local governmental interest it will be invalidated only if its incidental burden upon interstate commerce is clearly excessive when weighed against the benefits it confers upon the state promulgating it. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

As previously stated, the courts have long recognized that the regulation of the milk industry is a legitimate exercise of a State's authority. See Nebbia v. New York, supra. In order to maintain an adequate supply of milk to consumers, the State must be concerned with the adequacy of milk supply. It is important to maintain a state's producers in times of oversupply of milk and resultant lower producer prices because of the heavy capital expenditure needed and the long time required to establish a new dairy herd. This is especially important in densely populated states like New Jersey where high land values increase the initial capital costs and thus the difficulty of getting into the dairy business.

Local dairy producers are essential to maintaining an adequate supply of milk for several reasons. First, a nearby supply of milk is necessary to meet emergency milk supply requirements. In addition, dealers must be able to monitor production quality standards by the dairy farmers. Moreover, the dealer's long term cost of securing local supplies (including transportation costs) are lower, thereby insuring reasonably priced milk to the state's consumers.

Furthermore, the volatility of the milk industry requires the maintenance of local dairy farmers in times of oversupply so they will maintain a presence during periods of shortage. A shortage of milk supply for fluid use occurred most recently in New Jersey and throughout the northeastern part of the United States during the period beginning in the fall of 1987 through the spring of 1990. During this period the presence of local farmers was essential to assuring an adequate supply of milk for consumers.

This legitimate state interest must be balanced against the incidental effect on interstate commerce. It is apparent from a fair reading of the record, that the assessment is applied evenhandedly to in-state and out-of-state dealers. All dealers may pass any increase on to Massachusetts' consumers. Any effect on interstate commerce would be slight while the state has a significant interest in assuring the maintenance of a fresh supply of milk to its citizens.

For these reasons, under Pike, the Massachusetts milk subsidy does not violate the Commerce Clause of the United States Constitution.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

Fred DeVesa
Acting Attorney General of New Jersey
Attorney for State of New Jersey as
Amicus Curiae

Mary Carol Jacobson
Assistant Attorney General
Counsel of Record

Gregory Romano
Deputy Attorney General
On the Brief

R.J. Hughes Justice Complex
CN 093
Trenton, New Jersey 08625
(609) 984-9664

Dated: December 13, 1993

DEC 14 1993

IN THE
Supreme Court of the United States OFFICE CLERK

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY
FARMERS, GORDON M. COOK, DAVID W. DUPREY,
WARREN E. FACEY, DONALD LEAB,
MASSACHUSETTS FARM BUREAU FEDERATION, INC.
AND MASSACHUSETTS COOPERATIVE MILK
PRODUCERS FEDERATION, INC. AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

ERWIN N. GRISWOLD

(Counsel of Record)

GREGORY A. CASTANIAS

JONES, DAY, REAVIS & POGUE

Metropolitan Square

1450 G Street, N.W.

Washington, D.C. 20005-2088

(202) 879-3939

ALLEN TUPPER BROWN

58 River Road

Gill, Massachusetts 01376

(413) 863-3100

Counsel for Amici Curiae

BEST AVAILABLE COPY

26 p

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE SO-CALLED "PRICING ORDER" HAS THE EFFECT OF A TAX ON SALES OF MILK BY DEALERS IN MASSACHUSETTS	6
II. THE NONDISCRIMINATORY PREMIUM IMPOSED UPON ALL FRESH MILK SOLD IN MASSACHUSETTS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE	8
A. The Burden Falls On Massachusetts Consumers ...	8
B. In Any Event, The Pricing Order Is Not Discriminatory	10
III. THE COMMONWEALTH'S SUBSIDIZATION OF DOMESTIC DAIRY FARMERS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE	14
IV. THE FACT THAT THE PREMIUM PAYMENTS ARE SPECIFICALLY EARMARKED TO SUBSIDIZE MASSACHUSETTS DAIRY FARMERS HAS NO CONSTITUTIONAL SIGNIFICANCE	17
CONCLUSION	21

(ii)

TABLE OF AUTHORITIES

Cases	Page
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	14
<i>Baldwin v. G.A.F. Seelig, Inc.</i> , 294 U.S. 511 (1935)	11, 12
<i>Carmichael v. Southern Coal & Coke Co.</i> , 301 U.S. 495 (1937)	19
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	11
<i>Eastern Air Transport, Inc. v. South Carolina Comm'n</i> , 285 U.S. 147 (1932)	7
<i>Felt & Tarrant Mfg. Co. v. Gallagher</i> , 306 U.S. 62 (1939)	7
<i>Henneford v. Silas Mason Co.</i> , 300 U.S. 577 (1937)	7
<i>Hughes v. Alexandria Scrap Corp.</i> , 426 U.S. 794 (1976)	8, 15
<i>International Harvester Co. v. Department of Treasury</i> , 322 U.S. 340 (1944)	11
<i>Lacoste v. Department of Conservation</i> , 263 U.S. 545 (1924)	18
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> , 309 U.S. 33 (1940)	18
<i>Metropolitan Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985)	14, 15
<i>Milk Control Bd. v. Eisenberg Farm Prods.</i> , 306 U.S. 346 (1939)	11
<i>Monamotor Oil Co. v. Johnson</i> , 292 U.S. 86 (1934)	7
<i>Nelson v. Sears, Roebuck & Co.</i> , 312 U.S. 359 (1941)	18
<i>New Energy Co. of Indiana v. Limbach</i> , 486 U.S. 269 (1988)	14
<i>New York Rapid Transit Corp. v. City of New York</i> , 303 U.S. 573 (1938)	18, 19

(iii)

TABLE OF AUTHORITIES (Cont'd)

	Page
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	11
<i>Reeves, Inc. v. Stake</i> , 447 U.S. 429 (1980)	15, 17
<i>Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n</i> , 365 F. Supp. 1144 (M.D. La. 1973), <i>aff'd</i> , 416 U.S. 922 (1974)	13
<i>Sonneborn Bros. v. Cureton</i> , 262 U.S. 506 (1923)	11
<i>Southern Pacific Co. v. Gallagher</i> , 306 U.S. 167 (1939)	7
<i>Trinova Corp. v. Michigan Dep't of Treasury</i> , 498 U.S. 358 (1991)	18
<i>United States v. Butler</i> , 297 U.S. 1 (1936)	19
<i>Usery v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1 (1976)	20
<i>Woodruff v. Parham</i> , 75 U.S. (8 Wall.) 123 (1869)	7
Constitutional Provisions & Statutes	
U.S. Const., art. I, § 8	19
Agricultural Adjustment Act of May 12, 1933, c. 25, § 9(a), 48 Stat. 31	19
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 7, 86 Stat. 150	20
Mass. Gen. Laws Ann. ch. 94A (West 1984 & Supp. 1993)	3, 10
Miscellaneous Authorities	
<i>American Heritage Dictionary</i> (2d college ed. 1991)	6
<i>Black's Law Dictionary</i> (6th ed. 1990)	18
Richard B. Collins, <i>Economic Union as a Constitutional Value</i> , 63 N.Y.U. L. Rev. 43 (1988)	12, 14

TABLE OF AUTHORITIES (Cont'd)

	Page
William B. Lockhart, <i>The Sales Tax in Interstate Commerce</i> , 52 Harv. L. Rev. 617 (1939)	7
2 Ronald D. Rotunda & John E. Nowak, <i>Treatise on Constitutional Law: Substance and Procedure</i> § 11.8 (2d ed. 1992)	17
Kevin Sack, <i>Proposing a Manhattan Stadium Is a Risky Play for Cuomo and His Team</i> , N.Y. Times, Oct. 3, 1993, at A37, col. 1	17
Laurence H. Tribe, <i>American Constitutional Law</i> (2d ed. 1988)	20
Jonathan D. Varat, <i>State "Citizenship" and Interstate Equality</i> , 48 U. Chi. L. Rev. 487 (1981)	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-141

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,
Respondent.

On Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY
FARMERS, GORDON M. COOK, DAVID W. DUPREY,
WARREN E. FACEY, DONALD LEAB,
MASSACHUSETTS FARM BUREAU FEDERATION, INC.
AND MASSACHUSETTS COOPERATIVE MILK
PRODUCERS FEDERATION, INC. AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI*

The Massachusetts Association of Dairy Farmers (the "Association") is an unincorporated association of milk producers located in the Commonwealth of Massachusetts. Messrs. Cook,

* Counsel for all parties have consented to the filing of this brief *amici curiae*. *Amici* have filed those consents with the Clerk of this Court.

Duprey, Facey and Leab are members of the Association and are owners and operators of dairy farms within the Commonwealth. Massachusetts Farm Bureau Federation, Inc. (the "Federation") is an incorporated, not-for-profit organization consisting of members of all segments of the Massachusetts agricultural industry, including approximately eighty-six percent of the dairy farms in Massachusetts. Massachusetts Cooperative Milk Producers Federation, Inc. (the "Co-op"), a Massachusetts not-for-profit corporation, is a marketing cooperative of approximately seventy Massachusetts dairy farmers. The Association, the four individuals, and the dairy farming members of the Federation and the Co-op are hereafter referred to as the "Producers."

The Producers' farms are part of the dairy industry which the Massachusetts Commissioner of Food and Agriculture declared to be in a state of emergency, thus bringing into effect the Milk Pricing Order which is the subject of Petitioners' attacks. The Producers have a direct interest in sustaining the validity of the Milk Pricing Order in order to avoid the loss of their farms.

The Producers support the decision of the Massachusetts Supreme Judicial Court that upheld the constitutionality of the Milk Pricing Order, and support the position of Respondent in this Court.

STATEMENT

1. In 1992, the Massachusetts Commissioner of Food and Agriculture "determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry." J.A. 30. The Commissioner's declaration of emergency was underscored by these findings:

(a) In 1991, the average Massachusetts dairy farmer received \$12.64 per hundredweight of milk (approximately 11.6 gallons), but it cost farmers an average of \$15.50 to produce that same amount of milk (J.A. 27); and "the price of milk in Massachusetts [is] twenty-six cents a gallon less than the national average" (J.A. 18);

(b) Because of this economic shortfall, Massachusetts dairy farmers "are no longer able to pay for feed for the[ir] cows, have been forced to mortgage homes which have been in their families for generations, are working twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families" (J.A. 27-28);

(c) Absent some form of relief, according to a professor at the University of Massachusetts, the Commonwealth would lose one-third of its remaining dairy farms in the next year (J.A. 28);

(d) The collapse of the local dairy industry would pose an immediate threat to the supply of fresh milk available to Massachusetts consumers: For instance, "farmers have petitioned the [United States Department of Agriculture] to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping" (J.A. 29); it is a reasonable inference that this proposed "reconstituted" milk, which is to be "treated as Class I fluid milk," will be sold in Massachusetts without labelling to indicate that it has been "powdered" and "reconstituted"; and

(e) The loss of its dairy farms would also seriously endanger the remaining rural aspects of the Commonwealth: "Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education." J.A. 13.

2. Consistent with the finding of an emergency, and pursuant to Massachusetts General Laws Annotated ch. 94A, §§ 10-12 (West 1984 & Supp. 1993), the Commissioner on February 26, 1992 issued an order which he called a "Pricing Order," "designed to boost the amount of money local dairy farmers . . . receive for milk above and beyond that required by the Federal [milk pricing] program." J.A. 121.

3. The Pricing Order works in this fashion:

(a) Each milk "dealer"¹ reports the amount of Class I milk (milk consumed as fluid and not processed into other products) which that dealer sold within the Commonwealth of Massachusetts during the preceding month. J.A. 34-35.

(b) The volume of Class I milk sold by the dealer in the prior month is then multiplied by an "order premium" -- one-third of the difference between the federally set "blend price" and the Commissioner-set target price. J.A. 35-36.

(c) The resultant amount is paid by the dealer into the Massachusetts Dairy Equalization Fund ("Equalization Fund"). J.A. 35.

(d) Monies in the Equalization Fund are then distributed to Massachusetts milk "producers"² in proportion to the milk produced by that producer during the preceding month. J.A. 36-38.

SUMMARY OF ARGUMENT

The Pricing Order under scrutiny consists of two principal elements: (1) It imposes a nondiscriminatory premium upon every unit of milk sold in the Commonwealth of Massachusetts, from whatever source; and (2) it provides for the payment of a subsidy, out of the Equalization Fund created from those

¹ The Massachusetts Department of Food and Agriculture defines a milk "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk." J.A. 32-33; *see also* J.A. 119 n.3. Each of the Petitioners is a milk dealer. J.A. 119.

² The Department of Food and Agriculture defines a "producer" as "any person producing milk from dairy cattle" -- *i.e.*, dairy farmers. J.A. 33; *see also* J.A. 120 n.4. Each of the individual *amici* is a milk "producer" within the Department's definition.

premiums, to the Commonwealth's dairy farmers in order to aid in their continued survival.

Three propositions support the constitutionality of the Commissioner's Order. *One*, this Court's decisions make clear that a State may constitutionally impose a nondiscriminatory premium upon a wholly in-State transaction. *Two*, a State may provide a subsidy to support a local industry without running afoul of the Constitution. *Three*, it is constitutionally inconsequential that the subsidy is related to the premium payments.

Since the order at issue accomplishes the permissible goal of saving Massachusetts' dairy industry without discriminating against or impermissibly burdening interstate commerce, the decision of the Massachusetts Supreme Judicial Court, sustaining the Pricing Order, should be affirmed.

ARGUMENT

These *amici* support the basic arguments presented in the brief filed on behalf of the Commissioner of the Massachusetts Department of Food and Agriculture. In an effort to be of assistance to the Court, and in the interest of the *amici*, counsel submit the further arguments which are set out in this brief.

Petitioners' contentions are summed up in three sentences from their Brief:

The Massachusetts court reasoned that the Pricing Order is "evenhanded in its application" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund." . . . But it is not just who contributes to the Fund that is the gravamen; it is also who takes out of the Fund. Almost all money paid into the Fund comes from out-of-state milk sources, while all the money paid out is given to in-state producers.

Petitioners' Brief ("Pet. Br.") 24.

Petitioners' understanding of the Pricing Order is largely correct. The Order *does* impose a nondiscriminatory premium upon all milk sold by dealers within Massachusetts' borders. And those whom the Fund benefits are *only* those milk producers located within the Commonwealth. The flaw in Petitioners' assessment of the Pricing Order is found in the third sentence; the money paid into the Fund is paid by dealers, but it does not follow that "all money paid into the Fund comes from out-of-state milk sources." On the contrary, all money paid into the Fund comes from a premium imposed only on the sale of milk within Massachusetts. And the burden of the payment does not fall out of State, but upon Massachusetts consumers. The result is not enough to show a violation of the "dormant" Commerce Clause.

I.

THE SO-CALLED "PRICING ORDER" HAS THE EFFECT OF A TAX ON SALES OF MILK BY DEALERS IN MASSACHUSETTS.

As the Pricing Order under attack was issued by an executive agency, though pursuant to a state statute, the assessed premium is not referred to as a "tax."³ It is clear, though, that the premium bears many resemblances to a "tax" — it is imposed by the government and it is paid into a government fund which is distributed in order to serve a public purpose. What Petitioners and their *amici* fail to recognize is that their proposed interpretation of the dormant Commerce Clause would not only affect "Pricing Orders" and similar government actions; it would

³ The question is also affected by the "no new taxes" atmosphere which is quite often found today. Thus, government officers generally avoid referring to exactions like this as a "tax" and prefer to use other language to describe the payment. It does appear, however, that "the amount owed to the fund" is "[a] contribution for the support of a government required of persons, groups, or businesses within the domain of that government." *American Heritage Dictionary* 1246 (2d college ed. 1991).

also work a profound change upon this Court's State-tax jurisprudence under the dormant Commerce Clause. Indeed, the "Pricing Order" in practical effect is a taxing provision requiring a payment to the government on *all sales* of fluid milk within Massachusetts. When so recognized, its constitutionality should be undisputed.

Although labeled a "Pricing Order," the Order under attack does *not* fix the price which the milk dealer must pay for milk produced outside Massachusetts. Rather, the minimum price to be paid to the producers for such milk is fixed by federal orders. The Pricing Order specifically provides, in its preamble, that "[t]he price the farmer is paid for his milk is established by a highly regulated federal pricing system." J.A. 32.

The Pricing Order has essentially the same effect as a sales tax on all fluid milk sold by dealers in Massachusetts. Without any reference to the dealer's cost for milk purchased from producers, it adds a charge when the milk is resold in Massachusetts for use as Class I milk. The result is in substance a tax paid to Massachusetts for all such milk sold within Massachusetts (regardless of where that milk was originally produced). The sale which is subjected to this charge occurs within Massachusetts, and the payment to the Commonwealth under the order is simply a cost of doing business, like a sales tax or the cost of transportation of the milk to the point of sale. The assessment of the premium is completely non-discriminatory and is fully applicable to milk produced both within and outside of Massachusetts. The power to impose such a "tax" — even upon goods which originate out-of-State — is firmly established in this Court's decisions. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869); *Eastern Air Transport, Inc. v. South Carolina Comm'n*, 285 U.S. 147 (1932); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). See also William B. Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harv. L. Rev. 617 (1939).

II.

**THE NONDISCRIMINATORY PREMIUM IMPOSED
UPON ALL FRESH MILK SOLD IN MASSACHUSETTS
DOES NOT VIOLATE THE DORMANT COMMERCE
CLAUSE.**

A. The Burden Falls On Massachusetts Consumers.

Throughout the Petitioners' brief, the contention is frequently made that the burden of the Pricing Order will fall on out-of-State producers -- in other words, that they will receive less for their milk than they would in the absence of the premium.⁴

There is little if any competent evidence in the record supporting this contention. On the contrary, it seems clear that the chief burden of the charge is borne not by out-of-State producers, but by Massachusetts consumers of milk bought at retail outlets, such as at grocery stores and supermarkets, or by dealers that chose, for competitive reasons, to absorb a part of the assessment as they might with any other cost. See J.A. 59. The dealer will base his charge for the milk to retailers on all his costs, which will include (a) the price paid to the farmer, (b) the price of transportation into Massachusetts, and (c) the amount of the Massachusetts premium, together with its other costs of doing business. Cf. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Since the premium is imposed equally on all dealers, it has no direct competitive effect. All or most of the dealer's costs, with an appropriate profit, will be passed on to the retailer, who, after a suitable markup, will fix his price to consumers in Massachusetts. Since all milk, wherever produced, will be subject to the Massachusetts premium, and not subject to non-taxed competition, the cost burden will fall on Massachusetts

⁴ Petitioners, both of whom are milk dealers located within the Commonwealth of Massachusetts, nonetheless claim a Commerce Clause injury in that "the Pricing Order is more economically harmful to out-of-state farmers, and those who deal with them." Pet. Br. 19 n.17 (emphasis added).

consumers. The Supreme Judicial Court below (the only court below that reviewed the record) concluded that "[t]he premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay." J.A. 130.

The premium clearly has little, if any, impact on the price received by producers outside of Massachusetts. Any impact on out-of-State producers will be incidental, at most. Petitioners' own expert witness testified via affidavit that the "primary consumer impact is in the higher price that must be paid for Massachusetts milk." J.A. 75. Even the President and Chief Executive Officer of Petitioner West Lynn Creamery, Inc. conceded that the Creamery passed the costs on to its Massachusetts customers: "... we attempted to pass on these costs. We're not going to hide the fact that we attempted to pass it on to all our customers." J.A. 58, 65. Indeed, the only injury that Petitioner West Lynn Creamery has itself suffered is a claimed monthly cost of \$30,000 to \$50,000 "to fund this tax payment." J.A. 58. This cost, however, is attributable not to any constitutional violation on the part of Massachusetts, but to West Lynn Creamery's own business judgment, since it has *chosen* to pass on only about half of the cost of the premium to its customers. *Id.* And West Lynn is a Massachusetts corporation, carrying on its operations, including these sales, in Massachusetts.

The burden of proof in this case is on the Petitioners, who were the plaintiffs in the trial court. They have not produced any evidence which shows that the burden of the tax will fall, in any significant degree, outside the Commonwealth. In fact, the evidence which they have produced shows that Massachusetts consumers have borne the burden of the charge. On this record, it must be concluded that the burden of the tax falls on Massachusetts consumers, who may petition the Massachusetts legislature if, in the future, they become unwilling to pay a few

pennies more for milk in order to preserve the dairy farms of the Commonwealth.

B. In Any Event, The Pricing Order Is Not Discriminatory.

Petitioners claim that the Pricing Order is discriminatory in purpose and effect, and therefore *per se* invalid. See Pet. Br. 16-31. It is not. Petitioners, and to a large extent their *amici* as well, reach this conclusion by erroneously focusing their attention not upon the incidence of the tax, but upon the recipients of the subsidy paid from the tax.

1. By properly focusing on the incidence of the premium, it is plain that the Order is nondiscriminatory. To sell milk on the wholesale level in Massachusetts, a milk dealer — whether located within or without the Commonwealth — must be licensed by the Commonwealth of Massachusetts. See Mass. Gen. Laws Ann. ch. 94A, § 5 (West 1984 & Supp. 1993); see also Pet. Br. 3. The Pricing Order imposes a premium upon each unit of milk sold *within* the Commonwealth by a Massachusetts-licensed dealer; it is irrelevant to the Pricing Order whether that dealer is located within or without Massachusetts. Nor is it relevant to the Pricing Order where the milk was originally produced.

Despite the undisputable fact that the Pricing Order applies only to sales of fluid milk which occur within Massachusetts, Petitioners nonetheless seek immunity from paying premiums based simply on the fact that they originally purchased the taxed milk from an out-of-State source. Of course, this is completely contrary to this Court's Commerce Clause jurisprudence, which holds that essentially local actions which benefit in-State interests do not run afoul of the Commerce Clause:

Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. . . . These principles . . . not only are inevitable corollaries of the constitutional provision, but their unimpaired

enforcement is of the highest importance to the continued existence of our dual form of government.

Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 351-52 (1939) (footnote omitted). See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

But, more drastically, Petitioners' proposed rule would wholly ignore a fundamental proposition established by this Court's State-tax precedents, that goods sold in-State are not immune from State sales taxes merely because they originate outside the taxing State. See, e.g., *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940) (sustaining sales tax "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power"); *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 508-09 (1923). Thus in *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 346 (1944), this Court said that where a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce, no violation of the Commerce Clause occurs. That is precisely the case here.

Under this Court's four-part test for determining the constitutionality of State taxes under the Commerce Clause, see *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Pricing Order would pass muster because (1) it is "applied to an activity with a substantial nexus with" Massachusetts — the sale of milk in the Commonwealth; (2) it "is fairly apportioned," because no other State could impose such a premium upon the same sale, and the amount of the premium is proportional to the business transacted in Massachusetts; (3) it "does not discriminate against interstate commerce" because it applies equally to all milk dealers; and (4) it "is fairly related to services provided by the State," such as police and highway services available to milk dealers who transact business within the Commonwealth.

2. Petitioners and their *amici* have also attempted to force their case into this Court's decision in *Baldwin v. G.A.F. Seelig*,

Inc., 294 U.S. 511 (1935). In so doing, however, Petitioners have glossed over the important differences between that case and this one. In *Baldwin*, New York had established minimum prices to be paid to in-State milk producers by milk dealers, a plainly proper system which "has support in our decisions." *Id.* at 519 (citing cases). However, the statute in *Baldwin*, unlike the Pricing Order here, also banned the sale of milk imported from another State unless the same minimum price had been paid to the out-of-State farmers. *Id.* This Court held that the latter requirement ran afoul of the Commerce Clause: New York, which had no sovereign interest in the well-being of Vermont's farmers, was plainly requiring the Vermont farmers to receive the same minimum prices -- not to preserve Vermont's dairy farms, but merely "[t]o keep the system unimpaired by competition from afar." *Id.*⁵

The Pricing Order under attack here thus is far different from the statute at issue in *Baldwin*. For one thing, the incidence of the tax does not fall beyond Massachusetts' borders, unlike the situation in *Baldwin*, where New York "project[ed] its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521. Rather, Massachusetts imposes the milk premium upon a wholly in-State transaction -- the sale of milk, within Massachusetts' borders, by a Massachusetts-licensed

⁵ Ironically, the State of Vermont now objects to the fact that the Massachusetts Order does not reach across State borders and pay premiums to Vermont farmers. See Br. *Amicus Curiae* of State of Vermont 2, 3, 4, 7. It is, however, "hard to see why out-of-state traders should have a federal right to share in commerce created by the state." Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 102 (1988). See also Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 540-41 (1981) ("When the states spend money directly on private parties, either through subsidies or through payments for goods and services, they would appear to have the strongest justification for preferring residents as the recipients of those funds").

milk dealer.⁶ Indeed, the costs of that premium are ultimately passed on to Massachusetts' milk consumers, who -- if they are not willing to pay a few cents extra for each gallon of milk in order to subsidize the Commonwealth's endangered dairy farms -- may avail themselves of the Massachusetts political processes in order to rescind the Order. Since the Pricing Order has only an intrastate reach, it does not implicate the same concerns for national economic unity as did the overreaching statute struck down in *Baldwin*.

Another important distinction between the statute at issue in *Baldwin* and the Pricing Order under attack here is that the latter does not "set a barrier to traffic between one state and another," as did the statute at issue in *Baldwin*. Rather, the Pricing Order imposes a premium on an in-State transaction which funds a subsidy for in-State dairy farmers. As the Massachusetts Supreme Judicial Court correctly recognized, "[t]he constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation." J.A. 129.

Thus, the Pricing Order does not discriminate against interstate commerce, for it is in substance and effect like a sales tax (or value added tax) imposed upon each unit of fresh milk sold *within* the Commonwealth, without regard to the place where the milk was produced. It does not in any way extend itself to transactions which take place beyond the Commonwealth's borders. Since the Pricing Order at issue suffers from neither of these claimed defects, it does not violate the Commerce Clause.

⁶ Compare *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three-judge court) ("there is no constitutional infirmity in a state regulation requiring that purely in-state transactions be governed by the Commission's pricing schedules . . . even though the product sold within the state and whose selling price is there regulated, originates outside of the state"), *aff'd*, 416 U.S. 922 (1974).

III.

**THE COMMONWEALTH'S SUBSIDIZATION OF
DOMESTIC DAIRY FARMERS DOES NOT VIOLATE
THE DORMANT COMMERCE CLAUSE.**

Petitioners' brief, and the briefs of their *amici*, are free in their accusations of "economic protectionism" in the Pricing Order. They say that since *all* milk dealers, in-State or out, are taxed, but only in-State milk *producers* benefit from the subsidy, the Commerce Clause is somehow violated. Petitioners seem to believe that any effort by a State to assist local business interests, which is funded by a tax levied upon a wholly in-State transaction in which both in-and out-of-State businesses engage, is a violation of the Commerce Clause. This is not an accurate reflection of this Court's decisions.⁷

Many cases support the right of a State to promote its own industries: "[P]romotion of local industry is a legitimate state interest in the Commerce Clause context." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 877 n.6 (1985). See also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry").

Indeed, such promotion can take the form of a subsidy paid to local industries, but not to foreign ones, so long as the subsidy has a rational basis. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition; discriminatory taxation of out-of-state manufacturers does." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269,

⁷ Accord *Collins*, *supra* n. 5, at 103: "Yet, the state treasury and state property are, for the most part, simply accumulations of state taxes, collected from out-of-state merchants as well as locals. Even so, reservation of resources for state citizens exports costs to a lesser degree than laws that selectively impose on outsiders. The treasury and other property of a state are sufficiently related to the tax burden on its own citizens to restrain subsidies by normal political discipline."

278 (1988); see also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 816 (Stevens, J., concurring); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. at 895 (O'Connor, J., dissenting) ("Moreover, the Court has held in the dormant Commerce Clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not."). Petitioners point to no constitutional requirement that the subsidy must be funded from taxes bearing solely on in-State interests, and indeed they cannot.⁸

Here, it is plain that Massachusetts dairy farms contribute to the Commonwealth's welfare in ways that out-of-State dairy farms cannot. As the Governor's Special Commission Relative to the Establishment of a Dairy Stabilization Fund found, Massachusetts' dairy farmers "have been the stewards of the commonwealth's land since the first decade of the sixteenth [*sic*; perhaps

⁸ Two of Petitioners' *amici*, the Milk Industry Foundation and the Food Marketing Institute, suggest in their joint brief (at p. 24) that this Court has approved subsidies only where the State "limits benefits generated by a state program to those who fund the state treasury" (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)). This quotation from *Reeves* is cropped and incomplete. In full, it is not helpful to Petitioners or their *amici*:

We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury *and whom the State was created to serve*. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, *and agricultural improvement and business development programs*. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State.

Reeves, Inc., 447 U.S. at 442 (emphasis added).

seventeenth was intended] century. . . . Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism and education." J.A. 12-13. At public hearings, citizens of the Commonwealth "expressed concern over losing the rural character of Massachusetts." "The overriding concern" expressed by Massachusetts' citizens in public testimony "was not that the retail price of milk would be raised, but that the natural characteristics of the Commonwealth would be gone forever if we lost our dairy industry." J.A. 17.⁹

The Commerce Clause surely does not stand as a bar to a State's efforts to preserve its countryside. With these important State concerns in mind, Massachusetts could appropriately subsidize its dairy farms in order to preserve a bit of its rural and rustic heritage, as well as a continuous supply of locally produced fresh milk. The Special Commission's findings make clear that Massachusetts' citizens were only too willing to pay the "two cents increase per quart of milk" (J.A. 18) which was estimated to follow from the Pricing Order, in order to preserve the Commonwealth's dairy farms.

In fact, it is common for States to subsidize local interests in similar ways. States may institute farm extension programs. They may reduce state taxes or grant tax holidays in order to encourage out-of-State businesses to relocate there, or to encourage local businesses to remain there. Indeed, New York has recently made efforts to retain its private financial institutions with various public incentives, and has even encouraged the New York Yankees to stay in New York with a potential offer to build

⁹ Again with a touch of irony, the Petitioners' *amicus curiae*, the State of Vermont, bemoans the tide of "creeping urbanization" and the loss of its own dairy farms, noting that this transformation from countryside to urban landscape "is an irreversible process; once dairy farms are transformed into subdivisions, there is no turning back." Br. *Amicus Curiae* of State of Vermont 15.

a new Yankee Stadium in Manhattan. Kevin Sack, *Proposing a Manhattan Stadium Is a Risky Play for Cuomo and His Team*, N.Y. Times, Oct. 3, 1993, at A37, col. 1. Compare 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 11.8, at 28 (2d ed. 1992) ("If New York were to decide to aid its dairy farmers to compete with Vermont dairy farmers, New York could, under *Baldwin*, decide to give its farmers, e.g., *cash subsidies* or tax relief in the form of reduced property tax or income tax payments.") (emphasis added). See also *Reeves, Inc. v. Stake*, 447 U.S. at 441.

In sum, the encouragement of local industry, by means of a subsidy, is a legitimate goal for a State to pursue; it does not violate the Commerce Clause.

IV.

THE FACT THAT THE PREMIUM PAYMENTS ARE SPECIFICALLY EARMARKED TO SUBSIDIZE MASSACHUSETTS DAIRY FARMERS HAS NO CONSTITUTIONAL SIGNIFICANCE.

Massachusetts has imposed a nondiscriminatory tax by assessing a transaction which is wholly within its borders. It has used those payments to build a Stabilization Fund, disbursements from which are used to subsidize an important local industry with historical, rural significance in the life of the Commonwealth's citizens. As the *amici* have shown, above, these are constitutional means to constitutional ends.

Apparently recognizing that Massachusetts may constitutionally subsidize local industry, Petitioners devote a section of their Brief to arguing that the Pricing Order is not, in fact, a subsidy. See Pet. Br. 28-31; see also Br. *Amici Curiae* of the Milk Industry Foundation and the Food Marketing Industry 24. Petitioners' argument has two threads to it. The first is that since "the Pricing Order never uses the word subsidy," it cannot be "classified as a subsidy." Pet. Br. 30. The second is that since the subsidy is not paid from general tax revenues, it cannot be classified as a "subsidy." *Id.* at 29-30 & n.26.

Both arguments champion form over substance, and neither is supported by this Court's decisions. In the first place, this Court has repeatedly eschewed distinctions based on labels in the Commerce Clause context. See, e.g., *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *Lacoste v. Department of Conservation*, 263 U.S. 545, 550 (1924) ("Regard must be had to the substance of the measure rather than its form"). Thus, whether or not the State labels the payments a "subsidy" has no constitutional significance. And in any event, it cannot seriously be disputed that State payments to local farmers, whatever they are called, are "subsidies" within the generally accepted definition of that term.¹⁰

In the second place, it makes no constitutional difference whether the subsidy originates in the State's general treasury or in a separate, earmarked Stabilization Fund, as is the case here. In *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938), a New York statute enabled cities "to adopt and amend local laws, imposing in any such city any tax . . . to relieve the people of any such city from the hardships and suffering caused by unemployment." The statute specifically provided that the revenues of such taxes "shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts" created "for the relief purposes for which the said taxes have been imposed." *Id.*

¹⁰ *Black's Law Dictionary* (6th ed. 1990) defines "subsidy" as

A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public.

Id. at 1428 (emphasis added). Massachusetts obviously considered that saving the Commonwealth's dairy farms was "a proper subject for government aid" and "likely to be of benefit to the public." See, e.g., J.A. 13, 27-30.

at 584 n.7 (quoting statute). In dismissing an equal protection challenge to the statute, this Court held:

We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

Id. at 587. And in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), Alabama's employers were required to pay a percentage of their payrolls into the State Unemployment Compensation Fund. This Fund was then deposited into the Federal Government's "Unemployment Trust Fund," from which benefits were paid to covered employees in the event of their unemployment. *Id.* at 506-07. This Court held that the earmarking of these funds for unemployed workers was irrelevant to the constitutional calculus: "If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals," rather than to the general treasury. *Id.* at 518.

Another case involving a "taxing" scheme quite similar to the Pricing Order is *United States v. Butler*, 297 U.S. 1 (1936). *Butler* involved the Agricultural Adjustment Act of May 12, 1933, c. 25, § 9(a), 48 Stat. 31, which imposed a tax "upon the first domestic processing" of certain commodities. The amount of the tax was fixed by the Secretary of Agriculture at a rate equal to the difference between the current average price of the commodity and the price which would have given the commodity "the same purchasing power" as it would have had in the pre-war period 1909-1914. Section 12 of the same Act appropriated "the proceeds derived from all taxes under this title" for specific agricultural purposes, including benefit payments to farmers.

The Court held that the Act was not a "tax" but an unconstitutional economic regulation; and that, for this reason, it was not within the power "To lay and collect Taxes" given to Congress by Article I, § 8 of the Constitution. However, "this distinction proved unworkable, and since its decisions upholding the Social Security Act, the Supreme Court has effectively

ignored *Butler* in judging the limits of congressional spending power." Laurence H. Tribe, *American Constitutional Law* 322 (2d ed. 1988) (footnotes omitted). See, e.g., the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 7, 86 Stat. 150, 157, which required mine operators to pay black lung benefits directly to claimants, and which was upheld against a due process challenge in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Petitioners' argument -- that it somehow makes a constitutional difference that the funds collected here are earmarked for Massachusetts dairy farmers -- invites the Court to engraft the same discarded formalism onto its Commerce Clause jurisprudence. The invitation should be declined.

In short, Petitioners would have no complaint if Massachusetts had enacted two separate statutes: one a nondiscriminatory tax payable to the state treasury, the tax being on all dealer sales of fresh milk within the Commonwealth of Massachusetts, and the other providing for a subsidy to the Commonwealth's dairy farmers out of funds in the general treasury. The Pricing Order accomplishes the same thing in a single statute, creating a separate fund from which the subsidies are paid. Petitioners do not, and can not cite any case which gives constitutional effect to such a formalistic distinction. Nor can Petitioners cite any reason for concern that a State may abuse an arrangement like the Pricing Order to undermine the economic unity of this country.

CONCLUSION

For the foregoing reasons, the judgment of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully submitted,

ERWIN N. GRISWOLD

(Counsel of Record)

GREGORY A. CASTANIAS

JONES, DAY, REAVIS & POGUE

Metropolitan Square

1450 G Street, N.W.

Washington, DC 20005-2088

(202) 879-3939

ALLEN TUPPER BROWN

58 River Road

Gill, Massachusetts 01376

(413) 863-3100

Counsel for Amici Curiae

December 14, 1993